IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

CLAYTON MARK & COMPANY, ET AL.,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BLEED THROUGH – POOR COPY

INDEX.

Index to printed record of proceedings before the Federal Trade Commission i

Clerk's Certificate to Volume I of printed record 866a

Clerk's Certificate to Volume II of printed record ..1736a

Clerk's Certificate to Volume III of printed record ..2626a

Clerk's Certificate to Volume IV of printed record ..3184a

Clerk's Certificate to Volume V of printed record ...3675

Proceedings in Court of Appeals:

- Order taking cause under advisement, entered Jan. 19, 1948 3677
- Opinion by Kerner, J., filed May 12, 1947 3678
- Order pursuant to Opinion, entered May 12, 1948 3688
- Petition for Rehearing, filed May 27, 1948.....3689
- Order denying Petition for Rehearing, entered June 14, 1948 3703
- Notice of motion for Stay, etc., filed June 17, 1948 3704
  - Motion for Stay of Certification and Enforcement of Judgment 3707
- Order granting Stay of Certification, etc., entered June 17, 1948 3709
- Decree, entered August 17, 1948 3710
- Designation for Supreme Court Record, filed Oct. 8, 1948 3716
- Clerk's Certificate 3719

Order extending time to file petition for writ of certiorari 3719

Order of Court of Appeals staying certification and enforcement of judgment 3720

Stipulation re exhibits 3721

Order allowing certiorari 3721

In the

United States Circuit Court of Appeals

For the Seventh Circuit

No. 8642

No. 8639 TRIANGLE CONDUIT & CABLE CO., INC., ET AL.,
No. 8640 ENAMELED METALS COMPANY, ET AL.,
No. 8642 CLAYTON MARK & COMPANY, ET AL.,
No. 8644 GENERAL ELECTRIC COMPANY, ET AL.,
No. 8649 SPANG CHALFANT, INC., ET AL.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

Petitions for Review of Order of the Federal Trade Commission.

BLEED THROUGH – POOR COPY

INDEX.

Certificate of Secretary 1
Complaint, dated Jan. 25, 1941..... 2
Answer of Lawrence R. Quinn, filed Apr. 9, 1941..... 23
Answer of Enameled Metals Co., filed Apr. 9, 1941.... 29
Answer of Steelduct Co., filed Apr. 9, 1941..... 35
Answer of H. G. Morrow, filed Apr. 12, 1941..... 41
Answer of General Electric Co., filed Apr. 12, 1941.... 47
Answer of Triangle Conduit & Cable Co., Inc., filed Apr. 12, 1941 51
Answer of General Electric Supply Corporation, filed Apr. 12, 1941 59
Answer of I. A. Bennett, et al., filed Apr. 14, 1941..... 62
Answer of Laclede Steel Co., filed Apr. 14, 1941..... 67
Answer of Walker Brothers, et al., filed Apr. 15, 1941.. 74
Answer of Clayton Mark & Co., filed Apr. 15, 1941.... 81
Answer of Youngstown Sheet and Tube Co., filed Apr. 15, 1941 85
Answer of Spang Chalfant, Inc., filed Apr. 15, 1941.... 92
Answer of The M. B. Austin Co., filed Apr. 15, 1941.... 96
Answer of George I. Hatheway, et al., filed Apr. 15, 1941 103
Answer of J. M. Barton, filed Apr. 16, 1941..... 105
Answer of Fretz-Moon Tube Co., filed Apr. 16, 1941... 109
Answer of Republic Steel Corp., filed Apr. 16, 1941... 113
Order appointing Trial Examiner, etc., entered July 25, 1941 116

Transcript of Proceedings.

Colloquy .....
....119, 196, 228, 245, 262, 302, 323, 331, 369, 506, 517, 586, 647, 818, 1048, 1113, 2143, 2457, 2495, 3016, 3390, 3402
Amended Stipulation of Facts..... 129

Witnesses for the Commission.

Testimony of:

Barton, J. M. 869
Benfield, H. H. 886
Bieger, William J. 2986
Bibber, T. H. 628
Booth, Robert S. 432
Carmichael, Eugene 975
Collier, J. H. 812
Custer, A. B. 304, 1097
Dell, Herman B. 252, 279, 327
Donald, W. J. 511, 525
Donley, Charles 713
Frascati, Joseph L. 595, 1035
Friend, Arnold H. 957
Garland, Robert 856
Gray, Horace M. 3055
Hatheway, George L. 699
Hawks, J. A. 682
Holly, George F. 783
Hula, Robert 891
Jacobs, Morris L. 653
Kim, C. J. 823
Loucks, William N. 3259
Maguire, John 3388
McAuliffe, John E. 600

Vol. I, pages 1 to 386; Vol. II, pages 387 to 1736; Vol. III, pages 1737 to 2626; Vol. IV, pages 2627 to 3184; Vol. V, pages 3185 to 3874.

BLEED THROUGH – POOR COPY

Mitchell, Walter, Jr. 1073
Morrow, Harry G. 764
Neilson, Franz 640
Nourse, Dr. E. G. 1054, 1104
Oberhauser, T. W. 987
Quinn, L. R. 927
Rougeou, Charles F. 3042
Simpson, John P. 1005
Vigman, Joseph 219, 240
Walker, H. S. 526
White, Hugh E. 3003
Williams, Samuel L. 180, 321, 358, 1037

Stipulation re: Offer of Proof by Laclede, et al. 1275

Stipulation re: Offer of Proof by Spang Chalfant, Inc.. 2469

WITNESSES FOR RESPONDENTS.

Testimony of:
Barton, J. M. 1822
Benfield, H. H. 1885
Bennett, I. A. 1398
Blake, Herbert S. 1589
Blake, Herbert S., Jr. 1737
Byers, Alfred 2132, 2149
Clifford, George E. 2370
Drury, Walter J. 2207
Eiseman, Fred R. 2320
Fairchild, Fred Rogers 2477, 2509, 2726
Garland, Robert 2410
Griffin, Clare E. 2737
Hodkinson, Frank C. 2080
Holly, George F. 1740
Hula, Robert 1862
Jacobs, Morris L. 2055

Johannsen, J. G. 2164
Latham, Leslie E. 2268
Morrow, Harry G. 2384
Newman, A. E. 1932, 2432
Nichols, Louis M. 2355
Quinn, L. R. 1116
Smith, Hoyt O. 2317
Thoman, Walter K. 1813
Tolles, E. 2125
Tompkins, Howard B. 2329
Vanderblue, Homer B. 2933
Walker, Hervey S. 1677
Wernette, J. Philip 2888
Williamson, Walter 2358

Motion to dismiss Complaint, etc. 3399

Trial Examiner's Report, dated July 23, 1942 3418

Exceptions of Commission to Report, dated Sept. 30, 1942 3548

Findings of Fact, etc., filed June 6, 1944 3481

Order to Cease and Desist, entered June 6, 1944 3544

Petition for Review by Triangle Conduit & Cable Co., et al., filed July 27, 1944 3556

Statement of Points 3561

Petition for Review by Enameled Metals Co., filed July 27, 1944 3566

Petition for Review by Clayton Mark & Co., et al., filed July 28, 1944 3579

Statement of Points 3585

Additional Statement of Points by Laclede Steel Co. 3606

Petition for Review by General Electric Co., et al., filed July 28, 1944 3610

Vol. I, pages 1 to 886; Vol. II, pages 887 to 1736; Vol. III, pages 1737 to 2626; Vol. IV, pages 2627 to 3184; Vol. V, pages 3185 to 3674.

Statement of Points 3619
Petition for Review by Spang Chalfant, Inc., et al., filed Aug. 2, 1944 3634
Statement of Points 3640
Motion to extend time to file Statement of Points, etc...3643
Affidavit of Hoyt A. Moore.....3645
Order extending time to file Statement of Points, etc...3650
Motion to simplify record, etc. 3650
Affidavit of William W. Robison.....3654
Answer to motion to simplify record, etc. 3661
Order granting motion to simplify record.....3666
Motion re: Designation of Record, etc. 3668
Statement by Respondent to motion, etc. 3670
Order on motion re: Designation of Record.....3673

BLEED THROUGH - POOR COPY

6182 PROCEEDINGS.

Trial Examiner Norwood: The hearing will come to order.

Pursuant to adjournment on yesterday, the hearing in Docket 4452 is now reconvened at 10 o'clock a. m., on March 12, 1942, in Room 388, office of the Federal Trade Commission, Washington, D. C.

Please note the appearances.

Dr. Horace M. Gray is recalled to the stand for further examination.

Proceed.

HORACE M. GRAY resumed the stand and testified further as follows:

Cross-Examination (Continued) by Mr. Robison.

Q. Dr. Gray, toward the close of the hearing yesterday I asked you to make certain assumptions, which were put on the record of yesterday's hearing at page 6173, and which, as the record shows, is to be referred to as assumption B.

Now, you have had those assumptions before you since yesterday, have you not?

A. Yes, sir.

Q. And you have them in mind?

A. Yes, sir.

6183 Q. Now, I ask you the question which I asked and remained unanswered yesterday:

Basing your answer on those assumptions, in your opinion, has manufacturer B referred to in those assumptions, in adopting and pursuing the policy there outlined, of selling only at delivered prices, violated any rule or principle of economics?

Mr. MacIntyre: And I state the objection to the question that I stated yesterday, that is, that we have inconsistencies and contradictions involved in the question, and incompleteness also, just as if the question asked if two automobiles were going down the street, one running ten miles faster than the other, what is the speed of each.

Trial Examiner Norwood: Objection overruled.

Answer the question.

A. I studied over the assumptions, and, while they are incomplete in certain respects, I can attempt an answer on the basis of the situation as I understand it from the material given here.

It seems to me that what manufacturer B is doing in electing to go on or to pursue a system of selling on delivered prices is that he has ceased to act in a competitive manner and has shifted over to a policy of what we might term monopolistic behavior, with the effect that he is able to sell into the territory of the other parties. To
6184 what extent is not clear, because of the lack of specific information. But it seems to involve a situation where B is exercising his individual freedom here to discriminate and to dump in the territory of other manufacturers.

That I should term as a departure from competition, and not a violation of any rules or principles of economics in the sense that I understand these terms to be used here.

We do not speak of a violation of a rule or principle; we speak of a form or pattern of behavior, and we describe those patterns by various names, as competitive or monopolistic, or you have various degrees of the two.

I should characterize it as a departure from competition, competitive procedure, rather than a violation of a rule.

By Mr. Robison:

Q. As I understand your answer, Dr. Gray, you do not mean to suggest by your answer that you consider that manufacturer B on the assumed state of facts would be doing anything that he did not have an entire right to do, acting entirely in what he considered to be his own best interest and solely on his own initiative?

A. As I understand the assumptions here, he did act independently, and he came to this decision without any communication with others.

Q. I did not ask you about the understanding of
6185 the assumptions; I asked you whether you meant by your answer to indicate that you consider that B would be doing anything that he as a seller would not have an entire right to do.

Mr. MacIntyre: Now, I object to that. Rights where and when and under what situation?

BLEED THROUGH – POOR COPY

Trial Examiner Norwood: Objection sustained.

I do not think this witness is an expert on rights. The Commission and the courts are passing on the rights.

Mr. Robison: Well, Mr. Examiner, there is no element of any legal question involved in what I have asked the witness. I have asked him whether in his view, meaning, of course, in his view as an economist, he would consider that on the assumed state of facts manufacturer B would be doing anything that he did not have an entire right to do.

Trial Examiner Norwood: I think that is perfectly clear, but I think you should ask him as to the economic aspects and results, and so forth. I do not think that question is at all admissible from this witness. I am not sure that you could ask that question of any witness. I don't think so.

Mr. Robison: Of course, I have my exception.

Trial Examiner Norwood: Yes.

By Mr. Robison:

Q. Dr. Gray, as an economist, would you find anything to object to or to criticize in the adoption and pur-
6186 suit by manufacturer B of the policy in the matter of pricing and sale of his product that is outlined in the assumptions B?

A. I would criticize it on my previous basis there, that it constitutes a departure from competition. Now, that is a critical economic judgment based on my understanding of the economic factors in the situation, and that criticism would not run to matters of public policy.

(Discussion off the record.)

Q. Now, I will ask you to assume all the facts that have been assumed in assumptions B and to assume further that manufacturer B, again acting in his own sole interest and without communication of any sort with any other manufacturer or seller in the industry, decides to and does publish his delivered prices for product X on the basis of a price at the point M, which is the place of production of manufacturer A, and that the delivered prices published and quoted by him are his price so published at point M plus railroad freight from point M to the place of delivery of the product to the purchaser, and I will ask you whether on all the facts so assumed you consider that manufacturer B would be using a basing-point method of quoting and selling the product X?

A. Well, as I understood your statements, he would be using the plant of manufacturer A as a base.

Q. That is correct. Well, will you answer the question, whether you consider that to be a—whether you con-
6187 sider that he, on that state of facts, would be using a basing-point method of selling?

A. Well, he might be regarded as a non-basing mill, his own mill, but using a base on the other fellow's mill. That is the situation.

Q. Well, answer the question—

Trial Examiner Norwood: Is that the method, as you understand it?

The Witness: Well, that would be a method of operating his delivered price system, yes.

By Mr. Robison:

Q. Well, your answer is "yes," then, to my question, that, in your opinion, he would be using a basing-point method of selling?

A. Yes, within the limitations that we set up there, yes.

Q. You mean within the limitations set up in the assumed statement of facts I have asked you to base your answer on?

A. Yes, and your subsequent statement there, the other fellow's.

Q. You mean my subsequent statement in my last—

A. Yes.

Q. —statement of assumptions? Is that what you mean?

A. Yes, that is what I mean.

Q. Assume again, please, all the facts that I have asked you to assume in these preceding questions beginning
6188 with the facts included in assumptions B, and assume further that manufacturer B, acting independently and in his own interest and without communication of any sort with any other manufacturer or seller in the industry, publishes as his price at point M, which is the place of production of manufacturer A for the product X, the same price that is currently published by manufacturer A for product X f.o.b. his plant at point M; in your opinion, would the policy thus adopted and pursued by manufacturer B in pricing and sale by him of product X contravene in any respect any recognized principle of economics?

Mr. MacIntyre: Pardon me. I would like to have that question read.

Trial Examiner Norwood: Read it.

Mr. MacIntyre: I was not able to follow all of it.

Trial Examiner Norwood: Read it.

(Question read.)

A. I should say that that would certainly contravene the competitive concept of "market" as a place of production and the—the while theory of a uniform market price at the place of production, and to that extent it would, as I indicated before, be a departure from the ordinary procedure under a competitive system.

Trial Examiner Norwood: Would that constitute a following of the price leadership of A?

The Witness: It might be. I wouldn't be able to 6189 answer that without knowing the situation.

Trial Examiner Norwood: Go ahead.

By Mr. Robison:

Q. Well, as an economist, would you find anything to object to or to criticize in the adoption and pursuit by manufacturer B of that policy in the pricing and sale of his product, aside from the fact that he had not been conforming to your concept of how a market might be expected to operate?

A. There again, I would criticize it as a departure from competition, and that has been the basis of my criticism all the way along.

Q. Well, do you mean by your answer to say that, in your opinion, manufacturer B, on that state of facts, would not be competing with other manufacturers for the sale of his product?

A. He is not acting in the way that we would expect a person to—or manufacturer to act if he were acting competitively. Now, that—that is the substance of my position, that in departing from competition he has—the competitive behavior, he has shifted over to an entirely different system.

Trial Examiner Norwood: Then you mean he is not competing; is that right?

The Witness: In the sense which I have consistently used the word "competition" throughout.

By Mr. Robison:

6190 Q. And will you tell us now in what sense you now in your recent answer used the term "competition"?

A. Well, in these recent discussions we have been referring to the—the price at the point of production; that is, at the market place, as the uniform price determined in the market as the competitive price. Now, any system of selling or pricing that departs from that is, of course, to that extent non-competitive; that is, it is not being done in accordance with the way that the system of competition operates.

Q. Well, is it not true, then, that in expressing the view that on these assumed facts manufacturer B would not be competing for the sale of his product, you are using the word "compete" or "competing" in a very technical sense?

A. No; I think I am using it in the general sense in which it is used by students of competitive economics in their analysis of pricing. I think I am using it in the general sense.

(At this point there was a telephone interruption.)

Q. Well, is your reason for saying that, in your opinion, this manufacturer B on those assumed facts would not be competing for the sale of his product, that he would not be selling in accordance with a pattern which you as an economist conceive to be the expected pattern of the operation of competition?

A. I think that is a correct statement of my view.

6191 Q. Can you as an economist suggest any reason or reasons why manufacturer B, if he deems it to be in his own best interest so to do, should not adopt and pursue the policy that I have asked you to assume in the pricing and sale by him of product X?

A. I can see why manufacturer B might desire to do as it has been stated here that he is doing. He is adopting a policy here which seems to me to result in—in terracing his market, in discriminating, and is varying his mill net, charging more for those buyers near his mill than those distant. He is by that method moving into the territory of others. Now, in a strict economic sense, without any regard to the laws or to the rules governing economic conduct, he is, of course, free to do that, and in the absence of the law and any controlling rules the others would

BLEED THROUGH – POOR COPY

be equally free to retaliate. It is the old problem of one—the action of one, that is, discriminatory action of one party, generating a retaliation on the part of the other. That is a very common characteristic of such situations.

Q. As I understand your answer, it seems to me to amount to this: That the only reason you suggest why B should not do as indicated is that in doing so he will be going off the reservation and not following your accepted practice of marketing procedure? Is that a fair statement of your answer?

A. No. No; that would be a far too limited state-
6192 ment. That would leave out my whole theory of the advantages to be derived from competition. Now, that has not been elaborated in these hearings, but that is a generally accepted view among economists, that competition has certain very significant advantages, and that policy has been sanctioned in the laws. Now, I don't want to elaborate on the general theory of the beneficience of competition. That would take us too far afield, but that is a reason why an economist would criticize this form of behavior.

Q. Well, I have asked you to assume in my last question that manufacturer B deems it to be in his own best interest to sell in this way. You would not criticize him because he differed from your views as to what is his best interest; would you?

A. No, but that raises the old question of each against all, of one man pursuing his own interest at the expense of others, and, as I understand the whole theory of the laws and policies governing the working rules of competition, they are designed to prevent that sort of thing.

Q. Yes, but you told me yesterday that in the relations of one seller with another you would expect each seller to be quite entirely ruthless in the following of his own selfish interest 100 percent; did you not?

A. I think I pointed out in that connection that they are presumed to operate within the rules of the game.

Q. Oh.

6193 A. These general rules of the game.

Q. I will accept that modification of my question. You did so indicate, and are we to understand that by following the rules of the game you mean following the procedures of a market as economists conceive the term "market" and its operations?

A. Yes. I think the answer is "yes" there, that those

are the working rules of the game as not only economists conceive it but as the public policy seems to conceive it.

Mr. Robison: Well, I think, in order not to have to pursue that particular element further, Mr. Examiner, I should move to strike out from the witness' answer the references to public policy. I think that is not within the sphere of the witness' expertness, and it is certainly not within the scope of any question that I asked him.

Mr. MacIntyre: Well, I oppose the motion on the ground that Mr. Robison now has what he asked for, and it should therefore remain even if he doesn't like it.

Trial Examiner Norwood: I have the impression that he was well within the field of proper explanation there, but I will study the record on that and deny the motion at present, and I will study the record. You may renew the motion after you are able to specify the pages and lines there, and I will give it my attention.

Mr. Robison: Well, that leaves me under the
6194 necessity of deciding at the moment whether I should pursue with the witness the matter of his familiarity with such policy and his expertness on such questions.

Mr. Stewart: If you don't, I will.

Mr. Robison: I think, however, in view of what you have said, Mr. Examiner, I will not pursue that at the present time.

Trial Examiner Norwood: Well, you may go ahead because I think that—

Mr. Stewart: I certainly will.

Trial Examiner Norwood: —he was within his rights there in explaining these things. You asked him why. You asked him the basis of his views on this thing, I think.

Mr. MacIntyre: Mr. Robison has asked him a half a dozen times why he as an economist would criticize these things.

Mr. Stewart: That still doesn't permit him to go into a question of public policy.

Trial Examiner Norwood: Unless it is different from what I think it is, I still won't change the ruling.

Mr. Robison: Well, of course, you understand, Mr. Examiner, my point is that the witness as an economist cannot be accepted as an expert on what is public policy.

Trial Examiner Norwood. No.

Mr. Robison: And in his answer and in the part
6195 that I moved to strike out he has undertaken to express an opinion as an expert on public policy.

BLEED THROUGH – POOR COPY

Trial Examiner Norwood: Well, I think he has given that in answer to your question there as the basis of his opinion.

Go ahead.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

By Mr. Robison:

Q. In the course of your direct examination, Dr. Gray, you expressed the view that what was referred to as the law of one price or of uniform price does not apply to quotations. I want to ask you in that connection whether you see any reason why a seller quoting in a market should quote a price above the price at which his commodity is then selling in the market?

A. Well, I must go back to my distinction between the price and a quotation.

Q. Well, my question refers to quotation only on the part of this seller—

A. The quotation—

Q. —and—

A. —in that case might be anything. As I see it, the seller would be probably free to quote any sort of
6196 a proposed offer or quotation he might want to, but the part—

Q. I asked—

Trial Examiner Norwood: Read that question.

(Question read.)

Trial Examiner Norwood: Do you see any reason for that?

The Witness: He might do it, but whether it would be of any consequence—

By Mr. Robison:

Q. I asked you whether you see any reason why he should do it.

A. Well, he might do it, but—

Q. But do you conceive of any reason he might have for doing it?

A. Oh, I might imagine some reason such as he might want to affect the ideas of people or influence people in thinking a certain way, a psychological motivation. Without knowing the facts, that is a pure assumption, of course.

Q. Well, let me put it this way, then: Assuming that

this seller we are referring to was a practical business man; would you as an economist expect him to quote in the market a price higher than the price at which his commodity is then selling in that market?

A. I wouldn't expect him to quote anything that is very far removed because if it is a competitive
6197 market, presumably your buyers will all know what the market price is, and if he is going to them and proposing quotations which are in excess of the market price—

Q. He would be doing quite a useless thing; wouldn't he?

A. I think he is wasting his efforts.

Q. Yes.

A. Yes.

Trial Examiner Norwood: Well, doesn't that happen on the market where there are bid and asked prices all the time?

The Witness: Oh, yes, you make quotations, sure, offers.

Trial Examiner Norwood: Go ahead.

By Mr. Robison:

Q. At page 6040 of the record of your testimony on direct examination two days ago you stated this—I quote: "I should say that the basing-point system described here does not develop out of the normal operations of a competitive economy," the question asked you having had reference to the method of price quoting as outlined either in hypothesis A or hypothesis No. 1.

Now, I ask you, in expressing that view what facts contained in hypothesis A did you take into consideration?

A. I remember the general description there of the basing-point system as offered, and then I was asked
6198 if I would consider that such a system would develop from the normal operations of a competitive economy, I believe were the words.

Q. You are right as to the nature of the question asked you.

A. But—

Q. Now, my question is, what facts necessary to the proper formulation of your answer to the question did you take into consideration,—meaning by my question which of the facts stated in hypothetical question A?

Mr. MacIntyre: Now, just a moment. If Mr. Robison wants any differentiation or picking out of any of these

BLEED THROUGH – POOR COPY

facts from any or all of them in those 12 pages, I insist that he hand the witness those 12 pages containing the statement of facts. This question was asked two days ago, and the witness does not have before him that entire statement of facts. The witness, therefore, is in a position of not having before him anything so that he could tell whether it is all of the facts, or any part of them, or which part of them. It is a 12-page statement, and the question was asked two days ago.

Trial Examiner Norwood: It is something he has given thought to.

Read the question, now.

Mr. Robison: You recall, Mr. Examiner, that the witness, before that question and other similar questions were put to him, was asked whether he needed to be shown the
statement of facts referred to as hypothetical state-
6199 ment A, and he said he did not need to be shown it.

Trial Examiner Norwood: He may ask to be shown it if he wants to.

Read the question, will you, please.

(Question read.)

Trial Examiner Norwood: Can you recall this?

A. I should say that my response was based upon the total situation as described in that long description, which contained a great many separate statements. I would not say that I predicated my answer on any one of those statements. I tried to respond to a total situation which was described there, and I think my answer did indicate that I was considering the system as a whole as it was described there.

By Mr. Robison:

Q. Now, in making the answer to the question asked you on direct examination to which I have referred, did you have in mind this statement, which comes from paragraph 3 of what is referred to as hypothetical statement A:

"There are in the United States eleven manufacturers of conduit which are independent each of the others and the largest of which has a productive capacity of less than 20 percent of that of the entire industry. The conduit manufacturing plants of seven of them, including at least two of the principal conduit manufacturers, and comprising in the aggregate over 75 percent of the productive
6200 capacity of the conduit industry, are located either at Pittsburgh, Pennsylvania, or within an area sur-

rounding Pittsburgh, from which freight rates to destinations outside of that area are in general the same as freight rates from Pittsburgh to those destinations respectively."

Did you have those facts in mind when you gave your answer?

A. My answer was not based on those facts or any other isolated facts that might be picked out of the statement, or isolated particular statements in the total situation there. I tried to respond to the total description of the system.

Q. Are we to understand that in giving the answer to the question asked you on direct examination you did not consider these facts that are shown in this paragraph which I have referred to?

A. I did not say that. I said I did not consider them—each statement of fact as separate and isolated and out of relation to the others. I tried to visualize the whole system and base my response on that.

Q. And in visualizing it did you have these facts regarding more than half of the producers in the industry being located in the Pittsburgh area in mind?

A. I had in mind those facts—

Q. You did have them.

A. —together with all others.

6201 Q. You did have those particular facts in mind, did you?

A. Yes.

Trial Examiner Norwood: You mean that those conditions were considered along with the other conditions named?

The Witness: Oh, yes. I have already stated that. I did not have to repeat that.

By Mr. Robison:

Q. Did you also have in mind these facts—of course, I mean assumed facts—which are stated in paragraph 12 of the statement referred to as hypothetical statement A—I quote:

"The manufacturers of conduit in the Pittsburgh area in quoting and selling conduit delivered at points to which shipment must be made from their plants commonly quote prices therefor equivalent to the price at Pittsburgh, plus the freight from Pittsburgh to the respective places of delivery of the conduit and sell conduit at delivered prices

so determined. Conduit produced at the other points outside of the Pittsburgh area previously stated is likewise commonly quoted and sold at the prices current at Pittsburgh, plus railroad freight from Pittsburgh to the place of delivery."

You say that you had the facts so stated in mind in giving your answer on direct examination and expressing the view that the basing-point system described in this hypothetical statement A does not develop out of the normal operations of a competitive economy?

6202 A. My response that the basing-point system does not develop out of the normal operations of a competitive system was not addressed to that particular isolated set of facts, but to the whole situation. I considered those things in those facts just quoted in relation to all the other statements that were made in an effort to describe the total system.

Q. So that you are prepared to say now that you did have those facts in mind in formulating the opinion that you expressed in your answer to Mr. MacIntyre?

A. Along with all others.

Q. Along with all the others?

A. Yes.

Q. Yes.

Well, now, having in mind what I have last quoted from paragraph 12 of the hypothetical statement A, do you consider that the manufacturers of conduit whose places of production are in the Pittsburgh area and who sell at delivered prices based on their prices at Pittsburgh are in any way departing from normal operations of a competitive market for manufactured commodities?

A. I don't know that I could answer that without having before me the exact location of those plants in this rather large area that you describe as the Pittsburgh area.

Q. Would it make any difference just where within
6203 the area of equivalent freight rates surrounding Pittsburgh the individual plants are located? Would it make any difference whether a particular plant is near the north boundary of that area, or the south boundary, or the east, or the west?

A. Well, I want to know the particular facts of the situation with respect to location and the freight situation there.

Q. Well, did you or did you not know those facts when

you gave the answer that you did to the question asked you on direct examination?

A. The question that was asked me was to respond to a total situation as stated there, and I had to take all of the things into consideration. I could not pick out this and give one answer there, and another part—it is like looking at a picture. You can't look at a picture and take the tree out and make sense of it. It is all blended together. And this long statement did do that. It went to make up the total picture. I was asked if this total system as described could develop. I couldn't answer on one particular fact. It is impossible.

Q. Well, now, you have gone pretty far afield from my question, Dr. Gray. My question is whether you consider that the seven manufacturers of conduit whose plants are in what has been referred to as the Pittsburgh area, being

6204 an area of equivalent freight rates from any point of shipment in that area to substantially all destinations at all remote from the area, whether you consider that those producers of conduit in selling in the manner indicated here are in any way departing from the normal operations of a market for manufactured commodities.

Mr. MacIntyre: Now, may we have that complicated question re-read? I did not follow all of it as it went along.

Trial Examiner Norwood: Read it.

(Question read.)

Mr. MacIntyre: Now, I object to that question unless there is some specification by Mr. Robison as to what place he is referring to as the Pittsburgh area having been referred to. It so happens that it is referred to in this paragraph which he was reading in one light, and it is referred to in a paragraph in another hypothetical question, which has been involved in the answer of the witness which is now in question, in a different light. So which one is he now referring to in this question pending?

Trial Examiner Norwood: Well, with this discussion, are you able to answer the question?

The Witness: I can. In my own language?

Trial Examiner Norwood: Yes.

Objection overruled.

6205 A. I should say in answer to your question, Mr. Robison, that I would not regard the Pittsburgh manufacturers that you mention there as acting competitively if they were a part of a total system of pricing,

FILED THROUGH = POOR COPY

which in my judgment is non-competitive. That is, you can't isolate them from the total system. If they are a part of the system, why, that is that, they are a part of it. And if the thing as a whole operates in a way which is not according to economic principles, why, I don't see how you can pick out a few, such as those at Pittsburgh, and say they are behaving competitively if they are a part of the total system. I don't want to quibble about the words "total system," but—

By Mr. Robison:

Q. Whether they are a part of what you call a system or not, on that state of facts outlined to you, is there any doubt in your mind that these Pittsburgh producers are selling on a basing-point method when they sell their products at delivered prices computed from their respective prices at Pittsburgh?

A. Well, as I understood the general description there, they were part of the total picture.

Q. That does not answer my question.

Trial Examiner Norwood: He asked you if they were selling on a basing-point method. Did you understand that or not?

The Witness: Yes.

By Mr. Robison:

6206 Q. Now, your last previous answer, a rather lengthy one, seems to me to indicate that before you considered this hypothetical question you had a preconceived notion and opinion that the basing-point method of selling was not a competitive method, did you not?

A. It would be incorrect, I think, to say that after having studied the subject for 20 years I did not have any idea on the subject. I did have certain ideas. But this proposition was purported to be a description of a certain system and a particular set of facts all fitted together into a pattern. And what ideas I may have gleaned out of my 20 years of study about the basing-point system in general, I would not base my answer on that; I tried to respond to the description set out.

Q. And considering the basing-point system, as you call it, as reflected in this hypothetical statement A, in what respect, if any, does it differ from the basing-point method or methods of selling products that you had studied and

considered prior to your consideration of this hypothetical statement A?

6207 The Witness: I can't answer that, Mr. Examiner. I have looked at many of these over the years and no two of them are alike. It seems to me that that is an unfair question to expect me to describe in detail all the similar plans or systems of selling.

6208 Trial Examiner Norwood: Can you recall any essential differences between the plan as outlined to you here and other plans that you have studied?

The Witness: I can't on the spur of the moment do that without looking the matter up and going into it.

By Mr. Robison:

Q. I call your attention to the further statement contained in paragraph 12—when I say "further" I do not mean that I have not referred to in a previous question recently asked you—the statement being as follows:

"Conduit produced at the other points outside of the Pittsburgh area previously stated is likewise commonly quoted and sold at the prices current at Pittsburgh, plus railroad freight from Pittsburgh to the place of delivery."

Now, if, as is elsewhere shown in this hypothetical statement A, conduit was first produced in the Pittsburgh area and sold in the way we have discussed here, on the basis of a price at Pittsburgh plus the freight to the place of delivery, and then, as appears here, another manufacturer subsequently located at a point outside of Pittsburgh and sold wherever he could sell at the price at which he found conduit being sold at those respective localities by the Pittsburgh producers, would you say that in adopting that policy and practice in selling his commodity this more recent producer outside of Pittsburgh was selling in a

6209 way which was not in conformity with economic concepts of competition?

A. Yes, I should say that he is. Under the competitive theory there would be no reason why he should adopt the Pittsburgh price. If he set up a mill of his own at some distance from Pittsburgh, under competitive theory he would base his prices on his own costs in his own mill.

Q. Well, suppose that in trying to sell at any given point which is outside both of Pittsburgh and of the location of this later producer's mill the price arrived at, as you have indicated, as the price of his mill would be higher than the price at which other sellers were selling there.

BLEED THROUGH – POOR COPY

A. You mean selling in the area immediately adjacent to his mill?

Q. No; in the point which is outside of both Pittsburgh and his location.

A. I don't—

Mr. Robison: I will ask, since there seems to be some misunderstanding of the question, that it be read thus far, Mr. Examiner.

Trial Examiner Norwood: Read it.

(Record read.)

By Mr. Robison:

Q. Now, I ask you whether, in your opinion, in selling at such an outside point and in quoting a price for his product at that point on the same basis of price at which the
6210 Pittsburgh producers were there quoting and selling, would you say that that more recent producer was not engaging in competition with the Pittsburgh producers?

A. I should say that that is a form of artificial competition, if I may use that term, and I did use it earlier in our discussions. It is predicated on the assumption that this new producer is to sell everywhere.

Now, my whole theory of market, and of the market place, the center, and the market area, was predicated on the assumption that he could—would have a freight advantage in his own territory, and that that territory would be his, as we say, by reason of the natural freight advantage he has there.

Now, without knowing where this point is that you are referring to—it is some point not definitely located. I don't know whether it is in his market area or not. But if it is way outside of his market area, and he elects to ship out to that point, which is outside of his market area, I shouldn't think that conforms to the competitive idea of a market.

Trial Examiner Norwood: Five minutes' recess.

(There was a short recess taken.)

Trial Examiner Norwood: Proceed.

By Mr. Robison:

Q. Dr. Gray, I will ask you to assume that more than half of all the producers of rigid steel conduit in this country have their places of production in the Pittsburgh
6211 area, using that term as I have defined it in a recent previous question; further, that all of such producers in the Pittsburgh area sell conduit in the City of Washing-

ton; that another producer of conduit has its plant at Conshohocken, Pa., which is about 15 miles west railroadwise from Philadelphia, and that this latter producer also sells conduit in Washington; assume further that the cost of its principal raw material for the production of conduit, namely, standard steel pipe, to the producer at Conshohocken is higher than the cost of like pipe to the producers in the Pittsburgh area to the extent of a transportation charge from Pittsburgh or from Sparrow's Point, Md., to Conshohocken on the pipe purchased by the producer at Conshohocken, and that in consequence we can make no assumption as to whether Washington is, in the sense in which you have used the term "the advantage area of a producer"—rather, "the market area of a producer" in the market area of any Pittsburgh producer or of a producer at Conshohocken.

Now, you would say, would you not, on that statement of facts that you would consider that when a Pittsburgh producer sells conduit in Washington the market is in Pittsburgh?

6212 A. I am not sure that I can answer that question because it seems to me that the facts that one would have to have in order to determine the market area of the Pittsburgh producers and the market area of this Conshohocken producer are not in hand. I am told that his cost of raw material is somewhat higher. On the other hand, he is, as I remember my geography, near to Washington, but by how much I don't know. I think it is a factual question of what the costs are at Pittsburgh, what the costs are in Conshohocken, what the distances are, what the freights are. I don't think I could make

6213 such an answer to that question.

Trial Examiner Norwood: Read the last part of that question, the question part of it.

(Record re-read.)

Trial Examiner Norwood: You say that there are not sufficient facts assumed there to enable you to tell whether Pittsburgh is the market or not?

The Witness: Oh, in line—that one phase of it there could be answered that—in line with my previous question, that the market place is the place of production, you know that Pittsburgh is a place of production, but whether Washington lies within the market area of Pittsburgh or Conshohocken, I would have to go into facts to know. I don't know.

By Mr. Robison:

Q. Well, would you say this, then, Dr. Gray: That in any event you would not consider Washington as the market place?

A. I have maintained that position, that the point of destination where the goods were being delivered is not within my meaning of the term "market." Now, within what territory it lies, your own question said that was indeterminate. I can't answer that part of it.

Q. Well, then, since Washington, under those circumstances, is not the place of the market, it follows, does it not, that the market must be either at Pittsburgh
6214 or at Conshohocken, on that assumed state of facts?

A. Assuming those are the only two production centers.

Q. That is what I have asked you to assume.

A. Yes.

Q. Just the facts that I have stated to you.

A. Yes. I should say that the market is at those two points of production, your Pittsburgh market and Conshohocken market. Now, what the boundaries of those two are I couldn't answer.

Q. Do you find in the facts that I have asked you to assume in these last questions any basis for expecting the Conshohocken producer to make sales of conduit in Washington at a higher price than the price that is currently charged for conduit there by one or more of the Pittsburgh producers?

A. I don't think the facts that are available here are sufficient to answer that question.

Q. Well, what is the nature of the facts that you consider to be missing in order to enable you to state whether you would expect the Conshohocken producer to sell conduit in Washington at a higher price than that at which Pittsburgh producers were then selling there?

A. Well, under a competitive system what the Conshohocken producer could do would be determined by his basic cost plus the added freight that the goods would have to bear.

Q. Well, please understand that I have not asked
6215 you what the Conshohocken producer could do. I have asked you only what you would expect him to do.

A. Well, if he is behaving competitively I would expect

him to take his basic cost of production, which would include, of course, as we have already discussed, return on the capital, and figure out the cost of moving the goods and if his basic price at—that is, his uniform mill price at Conshohocken plus the freight put those goods down in Washington at a price which was higher than some other producer delivered—some other producer's delivered cost, why, under a competitive theory this Conshohocken producer could not get in there. On the other hand, he might be able to get in there cheaper. It is a question of fact.

Q. So if his price at Conshohocken plus freight to Washington was higher than the price at which one or more Pittsburgh producers were then selling in Washington, you would expect him not to attempt to sell in the Washington market? Was that your answer?

A. Yes, on the basis of the competitive assumptions. He could not do it if his costs were higher.

Mr. Robison: Mr. Examiner, I find that I am getting pretty hoarse, and Mr. Gilpatric has some questions that he would like to ask. I will defer to him, with your permission.

Trial Examiner Norwood: Go ahead, if it does not
6216 prolong the cross-examination.

Mr. MacIntyre: Has Mr. Robison completed his cross? Is that what we are to understand?

Trial Examiner Norwood: Have you completed your cross?

Mr. Robison: I have no further questions to ask on cross in mind.

Trial Examiner Norwood: Go ahead.

By Mr. Gilpatric:

Q. Dr. Gray, in your direct testimony you testified on Tuesday that the basing-point method of pricing tends to have the effect of scattering, or I think you said disintegrating or dispersing, the market or markets for conduit, according to your concept of a market. Now, if we eliminate from the hypotheses here, No. 1 and A, on which you have been basing your answers, the basing-point method of pricing, where would the conduit markets be located under the facts assumed in hypothesis No. 1?

6217 A. As I understand it, Mr. Gilpatric, now, you are eliminating the basing-point system altogether. What might be substituted therefor, of course, is not known,

BLEED THROUGH – POOR COPY

but if they went back to the f.o.b. mill price system and all followed that consistently, then it seems to me you would have not, of course, a perfect competitive market because, as we discussed at great length yesterday, when you
6218 have a few sellers you just don't have anything nearly approaching perfect competition, but you would have the uniform base price, the price at the—at the market, that is, at the producing centers. That would be my conception of a method of organization and pricing which would come as near to the competitive ideal as it is practical to attain in this imperfect world.

Q. Is that what you would refer to, using your own terminology, as the geographic pattern of prices in conformity with your conception of competition?

A. You would have a pattern consisting of these—the so-called market areas, as I developed, or each producer would have an advantage in the territory where he had the freight—

Q. Whether or not there was more than one producer at a particular point?

A. Yes, you would have a number of such points of production, and around each production center there would be this natural advantage territory.

Q. One at Conshohocken and one at Cohoes and one at Youngstown, Struthers, and one at Laclede, besides the one in Pittsburgh?

A. Yes, that is a correct statement, or repetition of my answer.

Q. You were asked a question on Tuesday by Mr. MacIntyre with respect to an industry in which certain assumed characteristics were present, and you were asked
6219 whether or not in such an industry the basing-point method or system of pricing would be inevitable. You stated that you knew of many industries where those characteristics were present where you did not have the—where you had an entirely different arrangement. Now, what I want to know is what those many industries were that you were testifying to.

A. I don't remember how I stated that. I don't think I used quite those words, but I remember the general idea, if that would be sufficient.

Q. Well, just let me read to you your own words, then. You stated, "Well"—I am quoting from page 6035 of the record:

"Well, these characteristics as outlined in these assumptions would not necessarily mean that the industry in question would have to use a basing-point system. We have many industries where you have large plants, overhead costs, and these other characteristics mentioned here, which operate under entirely different arrangements."

Now, what are those many industries?

A. Well, if you would run through the whole catalog of American industries I dare say you would find a lot of them.

Q. I don't want to run through them.

A. No.

Q. I want you to state what you had in mind when you made that answer.

A. Well, let us consider the automobile industry, 6220 for example. As far as I am aware, they are not using the basing-point system.

Q. Well, now, is that an industry where the product is homogeneous, in your opinion, as one of the assumed characteristics?

A. Well, not all the products, any more than all the products of other industries. But take any particular product—leave out the question of differentiation of quality—consider any one product, you have there overhead costs, large investments like that—

Q. Let me interrupt. One of the assumptions on which you based your answer was that the product would be homogeneous. Now, if the automobile industry is one of the ones, I want to know whether you consider that homogeneous.

A. Well, I don't mean to say that the products of the automobile industry are homogeneous, any more than the products of most of our industries. Take any one.

Q. You mean to say, then, that your answer to that question of Mr. MacIntyre's was not limited to homogeneous products?

A. I don't remember the connection in which that came up, but if that is an important issue, the homogeneity, I was addressing my answer there to the nature of the costs.

Q. No. The question which was asked you included a set of assumptions, the first of which was that the product was homogeneous or standardized. Then there 6221 were some six other assumptions. Now, on the basis of those assumptions you were asked the question

BLEED THROUGH – POOR COPY

whether the basing-point system would inevitably be used, and you said, "No," because you knew of many other industries where you had these characteristics which operate under entirely different arrangements." Now, I want to know what the other industries were with all of those seven assumptions?

A. Well, you could take a wheat farmer, for example. He has large fixed costs.

Q. Well, now, there again you are getting away from the assumptions. A manufacturing industry?

A. Well, I stated it in a general term, thinking in terms of a whole range of industry.

Q. Is wheat farming a manufacturing industry?

Trial Examiner Norwood: Was his statement that there were manufacturing industries—

Mr. Stewart: That was the question.

Trial Examiner Norwood: —meeting those conditions which did not operate on the basing-point system?

Mr. Gilpatric: That is right. He said, "We have many industries where you have large plants, overhead costs, and these other characteristics," the other five, which operate under entirely different arrangements. Now, all I want to know is what the many industries are.

The Witness: Well, I can't designate offhand a
6222 particular industry without looking—looking up the facts to see what are the facts about the pricing method followed in industry A, B, and C, and so on. You are asking me here to name a particular industry—

By Mr. Gilpatric:

Q. Now, wait a minute, Doctor. I am not asking you to name it. Mr. MacIntyre asked you to name this, and then you made the statement that there were many industries which have all these characteristcis which operate under entirely different arrangements. Now, did you or did you not have any specific industries in mind when you made that statement?

A. No, I had in mind a general observation ranging over my various study of these different companies where you had overhead costs, large investment, but did not have the basing-point system, and I tried to answer in those general terms. I didn't have in mind any particular industry.

Q. Well, can you name one specific industry where you

have the seven characteristics that were included in Mr. MacIntyre's question, which operates under an entirely different arrangement from the basing-point method?

Mr. MacIntyre: I take exception to the question. There are only five of these characteristics, and Mr. Gilpatric said five others a while ago, and now he has raised it to seven.

Mr. Gilpatric: I will accept any amendment as to
6223 the number of assumptions in your question.

A. I will hesitate to name out of hand and without chance to look into the facts any—any particular industry. It is a thing that seems to me just can't be done with any accuracy. One can make a general statement based on one's general observation, experience, but when you go to saying, "Now, this particular industry has costs that behave this way," you have got to get your facts in there first.

Q. All right. I think that applies to you, Doctor. You made the flat statement that, "We have many industries where you have large plants, overhead costs, and these other characteristics mentioned here." Now, did you have in mind when you made that statement any specific industry?

A. No, I did not. I made that as a general observation growing out of my experience and without any particular industry in mind on which I based the statement. It is one of those general observations which—and I stand on that general observation.

Q. You mean there were many but you can't name a single one?

A. Well, I didn't answer with any thought in mind of naming a single industry. I don't think it is necessary in order to support my general observation.

Q. I am trying to find out on what your general observation was based when you say "There were many."

A. Well, my objection to naming a particular one
6224 is that it—just how those—those characteristics would behave in that particular industry is a question of fact which—

Q. Well, how can you make such an answer, then, if you are not prepared to back it up with one example?

A. I make it out of my general observation, general experience.

Q. You also testified in response to a question that Mr. MacIntyre asked you that if each conduit manufacturer were forbidden to use the basing-point method or system

BLEED THROUGH – POOR COPY

of delivered price quotations by order of a Government commission, that would result in fostering competition. Will you tell us how you arrived at that conclusion?

A. If I recall my testimony at that point, I went on to say what I had in mind by the word "foster"; did I not?

Q. No.

Mr. MacIntyre: Will you refer to the page on that?

Q. The answer was on pages 6053 and 6054.

A. Would you read the—

Q. I will read you the answer, I think:

"I think it would result in—in fostering competition, but I should add here in that connection that the abolition of this system would not in and of itself automatically restore perfect competition. I don't think any economist would maintian that, but it would—as the word 'fos-
6225 ter' indicates, it would foster or promote, increase the amount of competition in the industry."

That is the end of your answer. Now, I am asking you how you arrive at that conclusion.

A. That goes back to my basic theory of a market and of the—the intermarket competition, the pressure of one producer on another, the effort to extend their range of operation by reducing their cost relative to the other manufacturers' cost. That whole concept of intermarket competition it seems to me would be made more active, more effective, under an f. o. b. mill system. That is what I had in mind. You create a situation there where this force of intermarket competition can operate. I don't say it can operate perfectly, but it can operate. That is what I mean. You change the pattern so as to give what competitive forces there are a better opportunity to function.

By Mr. Gilpatric:

Q. That is all you had in mind in making that answer, that competition would be fostered if the basing-point system were forbidden?

A. I think that is explained in my general view.

Q. You also testified in that connection that one of the benefits that would accrue from having a system of f. o. b. mill quotations would be the elimination of the waste of cross-hauling. By that you mean that there would be
6226 less shipping by the various manufacturers into each other's advantage territory?

A. Yes, that would be—that would be eliminated, and the cost of moving those goods.

Q. So that in these particular advantage territories you would have less sellers of conduit offering their products for sale if you reduced—

A. Yes, each one would have advantage in his freight territory, you see.

Q. But the previous condition of other manufacturers shipping into and selling in that territory would be eliminated?

A. Yes, they—according to my theory, they could not come in there because to do so they would be at a disadvantage in respect to freight. It would cost them more to get in there than the fellow who is already in that area, and that would be a freight advantage.

Q. Don't you think that would result in a lessening of competition in those areas? You have fewer sellers offering their products?

A. No. No; we just can't do anything about that fewness of sellers. You see, that is a fundamental fact in the organization of American industries. There it is. You have that situation.

Q. Well, you now have a number of sellers selling in all of these territories under the basing-point method?

6227 A. Yes. Yes, but they are selling by a system which I have already indicated it seems to me is not a competitive system. No; what it would do—my point I have been insisting on all the way through there, the f. o. b. system, you do focus the demand on the production center and you do have there a market. Well, now, it is not perfect. You have one seller, but you do focus the demand. My observation about the basing-point system was that it tended to scatter and disperse and to isolate the buyer, so that you never had that converging of the demand on a particular center which you have to have if you are going to have any pretense of a competitive market.

Q. Well, am I correct in understanding your reasons for saying that competition would be fostered by the introduction of an f. o. b. mill quotation plan were that the advantages of eliminating this waste of cross-hauling that you referred to would more than offset whatever consequences flow from having a fewer number of sellers in a particular market territory?

A. Well, as I pointed out yesterday to Mr. Robison—

BLEED THROUGH – POOR COPY

Q. Well, can you answer that just "yes" or "no"? Have you thought of—

A. State that again.

Trial Examiner Norwood: Read it.

(Question read.)

A. Well, the—I can't answer that "yes" or "no" because the—

6228 Q. You mean they would not be more than offset?

A. No, that doesn't indicate my meaning.

Q. Well, you have stated that there would be elimination of cross-hauling—

A. Yes.

Q. —under an f. o. b. mill price system?

A. Yes.

Q. You have also stated that since each seller would be confined to his advantage territory, you would have fewer sellers than you now have?

A. No. No. You would have the same number of sellers. You can't make any more.

Q. Fewer sellers offering goods for sale in a particular territory?

A. Well, but you would substitute for that, what you have just stated, this idea of inter-intermarket competition, or competition of adjacent markets. That is what you have in an f. o. b. system. You would substitute that system for the one that now exists. Now, my whole argument is that the one we are talking about, the f. o. b. system—mill system, would be closer to—approximately closer to competition.

Mr. Stewart: Closer to what? I didn't catch that.

The Witness: Competition.

Mr. Stewart: Competition. Keep your voice up.

The Witness: Competition. Competitive system.

6229 By Mr. Gilpatric:

Q. Well, would you include among the advantages of introducing the f. o. b. mill price system a reduction of sales expense?

A. As I see it, it would reduce the expenses of selling.

By Mr. Gilpatric:

6230 Q. How would that follow?

A. Well, under your—under your f. o. b. system that we have been discussing here where you would have one seller making an f. o. b. price and selling in a natural territory, it seems to me that the sales expense there would

not be a very large item. I think it would be desirable to have men acting in that capacity, but it seems to me that that system as compared to the other would involve less cost. When you get firms selling all over the map, this wide dispersion, and making identical delivered prices under the system, it seems to me your salesman's function there is to get business not on price competition but on other types of rivalry, and it is my observation that in those instances that tends to run into some expense. You change the function of the salesmen into two systems, and I think that would involve some different expenditure.

Q. Well, do you think the functions of the salesman under the basing-point method are advantageous or disadvantageous to the buyers of conduit?

Mr. MacIntyre: Now, I object to that.

Trial Examiner Norwood: Objection sustained. We have covered that yesterday.

By Mr. Gilpatric:

Q. You also testified yesterday, Dr. Gray, that the introduction of uniform f. o. b. mill prices in place of the
6231 existing basing-point method of pricing would not only bring about a reduction of the cost of production through cutting out cross-hauling, about which Mr. Robison asked you, but would also increase production. I want you to explain how you arrived at that conclusion.

Mr. MacIntyre: Now, I object to that. It is a rehash of Mr. Robison's cross-examination.

Mr. Gilpatric: Now, that is not a rehash.

Trial Examiner Norwood: I don't think they covered that point there. This is cross-examination.

Mr. Gilpatric: He made a statement that production would be increased. Now, we are entitled to—

Trial Examiner Norwood: Objection overruled.

Answer the question.

A. My theory on that was this: That to maintain the basing-point system with all its imperfections you must necessarily, I think, maintain a general level of prices higher than it would be necessary to maintain if you had a somewhat more competitive system such as I have in mind in the f. o. b. system. Now, if that assumption is correct—and I think it would be—then the way would be paved to lower prices, stimulate more demand, get more customers and more intensive use of the product, and that growth in

BLEED THROUGH – POOR COPY

demand which you tap at these lower price levels, I think, would result in a considerable increase.

6232 By Mr. Gilpatric:

Q. Well, now, in arriving at that conclusion are you basing it on the fact that this industry involves an elastic demand?

A. I am basing it on the—without making any definite statement about the exact amount of elasticity, which I couldn't, because I don't have the facts, on a general observation that a lowering of the price tends to stimulate increased demand, bringing in new users who formerly would not use a product at the higher price but would take it at the lower price; people use more of the product, use it in more different ways. You get a stimulation of the total demand there by a reduction of the price.

Q. Well, now, if it is a fact that the total demand for conduit in the United States varies with fluctuations in building activity, and if it is also a fact that because the cost of conduit is normally only a small part of the total cost of a building project, the demand for conduit is not materially influenced by the prices payable for it, would you make the same answer to that as you made to the previous question?

Mr. MacIntyre: I object to that because it is directly contrary; in fact, it is a contradiction of the evidence put into the record by the Respondents.

Trial Examiner Norwood: That is not the test.

Mr. Stewart: Not only that, but this is out of the
6233 hypothetical question that Mr. MacIntyre asked him about.

Trial Examiner Norwood: The test is whether there is any evidence in the record to support it.

Mr. MacIntyre: Well, I contend that there is not, that the evidence in the record is contrary to it.

Mr. Bozeman: Several witnesses so testified.

Trial Examiner Norwood: Yes; I think so.

Mr. Stewart: Yes, they did.

Trial Examiner Norwood: Objection overruled.

Answer that question.

Now, regardless whether you believe that to be true or not, just give us the inferences which arise therefrom, based on economic theory.

The Witness: Read me the question again.

Trial Examiner Norwood: Yes; read it.

(Question read.)

A. What was my answer to the previous question?

By Mr. Gilpatric:

Q. I am referring to your previous statement that production would be increased by the—

A. I still maintain that a reduction of the price would increase demand, even with all the limitations mentioned here.

Q. Where would that demand come from?

A. It would come from various sources. If you lower your price you would have new users, people using
6234 more of the product. You don't have a standard situation.

Q. Well, now, the assumption is, Dr. Gray, that the demand is confined to building.

A. One never knows what the demand is confined to. You see, you start out by assuming—

Q. Well, now, you stick to my assumptions.

Trial Examiner Norwood: Well, do you assume that those conditions could not be changed by price variations?

The Witness: They would be changed.

Trial Examiner Norwood: That is, varying directly with the building, and so forth? Do you want to include that in the assumptions, that that situation could never change?

Mr. Gilpatric: I am asking—

Mr. Stewart: Mr. Examiner, as I understand—excuse me.

As I understand—

Mr. MacIntyre: That is just what he has not included, if Your Honor please.

Mr. Stewart: Just a moment, please.

Trial Examiner Norwood: He can throw a little light on that.

Mr. Stewart: Our witnesses testified that there was no noticeable change in the amount of conduit sold by variations in price. Now, we are asking the witness to take that assumption as it is and answer the question.

6235 Trial Examiner Norwood: I think he has done that.

Mr. Stewart: Well, I think he is dodging the question every time.

Trial Examiner Norwood: Under those conditions and whether they continue to exist, what would be the result?

BLEED THROUGH – POOR COPY

The Witness: Well, the question, though, implies that there is going to be a change of conditions, because I was asked, "What would happen if you lowered the price?"

Trial Examiner Norwood: No.

The Witness: I said that the demand would increase.

Mr. Gilpatric: No. No.

Trial Examiner Norwood: Would the price increase the demand if those conditions continued to obtain?

The Witness: Well, but a lowering of the price would change the conditions.

By Mr. Gilpatric:

Q. You mean regardless whether the demand for the product was elastic or inelastic?

A. You are assuming that the demand is a fixed and unchangeable thing there. Now, competitive theory doesn't recognize such an assumption.

Trial Examiner Norwood: Well, now, that is just why I am going to ask you—you have given us your theories here, and I am going to ask you to take that assumption, if it did exist, and tell us what would be the result, 6236 and you should be able to do that and not take issue with the assumptions. You are not supposed to do that.

The Witness: Well, then, but I would have to answer this way, which would not make any intelligent answer: That, assuming the demand never varies, then, of course, the demand won't vary if you change the price, which doesn't make sense in theory.

Trial Examiner Norwood: That is your answer; is it?

The Witness; Let the record show it is.

Trial Examiner Norwood: Yes.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

By Mr. Gilpatric:

Q. Now, if it is a fact—and I am asking you to assume this in answering the question—that the demand for conduit does follow the demand in the building industry, the activities in the building industry, and that the variations in building activity in the one area do not necessarily follow the variations in building activities in another area; what effect on the regularity of production of the respective conduit sellers will follow from the introduction of the uniform f.o.b. mill price plan?

A. I should assume that the f.o.b. mill price plan
6237 would tend to regularize production, because I think it would be more flexible to meet these changes which are described there.

Q. Well, now, let us analyze that. You stated that the uniform f.o.b. mill price plan, in your concept of competitive economy, these sellers could only sell in their advantage territories?

A. Yes.

Q. Now, I am asking you to assume that the demand for conduit in those territories varies with the activities in the building industry, and that when building activity is up in one area it may be down in another. Now, I want you to explain how, under those conditions, regularity of production is going to be increased by putting into effect your concept of a competitive economy?

A. It comes back to our much discussed problem of intermarket competition here. Under your statement, the demand increases in one place and it declines in another. Now, what will happen? In this area where the demand has declined due to the falling off of building activity, this producer is going to be hard put. How is he going to do business?

Q. Is he going to sell outside of his area under those conditions?

A. If the demand increases over in this other place adjacent to him enough so that he can—he can ship in there, he would move that way; not clear into the center,
6238 but he would move that way.

Q. Well, how is he going to sell there if he has not sold there before? Through what relationships would he sell?

A. I didn't say in the center. His operations would move to that area if the price went up.

Q. I am asking you if he has not previously sold in that territory, through what means is he going to sell in the other territories?

Mr. MacIntyre: Now, just a moment. I object to the question. It is argumentative, and it is a continuation of these arguments which were made yesterday afternoon.

Trial Examiner Norwood: Objection overruled.

Go ahead.

A. Well, if the price went up in the adjacent market, then he could move toward that market. In other words,

BLEED THROUGH – POOR COPY

his boundary would shift in the direction of the market where the price has gone up.

By Mr. Gilpatric:

Q. I am asking you how, through what selling means, what marketing method, would he sell there if he did not have his established relations with customers there?

A. Well, he would sell on a price basis, he would sell on a price basis.

Q. How would he get in contact with the customers in that area?

6239 A. Well, the customers—that is the purpose of having a market. You do focus the demand there. Your customers are presumed to know what is going on and to make decisions accordingly.

Q. Do you mean to say that the customers in this adjacent territory, to go back to our example yesterday of points A and B, who are used to dealing with market B, go over into market A?

A. Yes, they do. Where you have this shifting you have this intermarket relation, and what difference does it make to a buyer where he gets his goods? He gets them where he can get them cheapest.

(Discussion off the record.)

Trial Examiner Norwood: Recess until 1:45 when we will reconvene in Room 532, the main hearing room.

(Whereupon, at 12:08 o'clock p. m., a recess was taken until 1:45 o'clock p. m. of the same day.)

6240 **Afternoon Session.**

Room 532,
1:45 P. M.

Trial Examiner Norwood: Proceed.

HORACE M. GRAY resumed the stand and testified further as follows:

Cross-Examination by Mr. Gilpatric (Continued).

Q. Before lunch, Professor Gray, we were discussing a situation of the fluctuation in demand of conduit, and in terms of the examples we have been using you had stated that if the demand decreased in the market area of manufacturer B he would seek to sell in what had previously been the market advantage territory of manufacturer A.

A. Didn't we have the further assumption in there that the demand increased in A? Wasn't that in there?

Q. Well, is that necessary for your answer?

A. It seems to me the two situations—

Q. Would your answer be the same in either situation whether or not the demand increased in market A?

A. I understood that was the question that we were discussing, that the demand decreased in one and increased in the other. Wasn't that the—

Q. You meant your answer, then, to apply to that set of assumptions: Increase in A and decrease in B.

Mr. MacIntyre: I ask that the witness' attention
6241 be called specifically to the answer that is now being discussed so that he may know what the question was and what his answer is before he is asked to commit himself as to whether the answer was made in such a way as applying to a certain thing.

Trial Examiner Norwood: Do you understand the question, Doctor?

The Witness: No, I haven't got it straightened out yet.

Trial Examiner Norwood: Clarify it, please.

Mr. Gilpatric: All right, I will clarify it.

By Mr. Gilpatric:

Q. Going back to the situation that was referred to yesterday, the two points of manufacture, A and B, in your concept of competitive economy being two markets. Now, we assume that the demand for conduit falls off in market

BLEED THROUGH – POOR COPY

B and the demand increases in market A. What would be the consequences as far as sales by manufacturer B?

A. B would probably lower his price there because his demand had fallen off. That would be the thing that we would expect. Then, having lowered his price, he would be in the position to extend his market area toward A. You see, this expansibility of his market area is made up of the two elements, the freight element and the—his cost of production—pardon me—his price f.o.b. his mill. Now,

6242 if the demand fell off and he lowered his price that would give him more ability to move toward the market of A.

Q. Well, aren't you assuming that A becomes a deficit area, as you referred to it in your direct examination?

A. No, not necessarily. We assume—the assumption was that the demand was increasing in A. Now, that would—

Q. Well, the supply is still in excess of the demand.

A. Well, the demand going up in A, that would be reflected in the increased price, because the increase in the demand against a given supply would tend to send the price up. So you would have the price going up in one and down in the other. And that would make it possible for B then, for the two reasons, either one or both of them, the price going up in A and his price is going down, would give him economic ability then to extend his area toward A. That then would tend to equalize the situation. The two markets would be brought into a state of equality there, and you would have this shifting of this boundary or zone that we talked about yesterday.

Q. And you think under those conditions the rate of production of manufacturer B would remain constant?

A. No. I was speaking of his price. He had lowered his price and was thereby able to extend his market area toward A. He would have a market then for more goods and could increase his production.

6243 Q. So that instead of his production declining with the decline in the demand it would be increasing?

A. If, as I explained it there,—if he lowered his price and extended his market. If he just sat tight and maintained his price, which he could not do under a competitive situation, why, of course, the production would fall off, because he could not sell his goods; his price would be too high relative to the demand.

Q. Well, now, let us take one further set of assumptions in this connection and assume that the demand is increasing in both A and B but that in a market which is not adjacent—

A. How is that latter part?

Q. —that in a market which is not adjacent to the market B there is an increase in demand. Now, what effect would the decrease in demand at market B have on the rate of production?

Mr. MacIntyre: May we have the full question read now?

Trial Examiner Norwood: Read it.

(Question read.)

A. The introduction of this other market which is not related to market B it seems would have no effect on market A; they are not related.

By Mr. Gilpatric:

Q. All right, leave that out and tell us what would
6244 be the effect on the rate of production of manufacturer B if the demand fell off at both.

A. At both A and B.

Q. Yes.

A. Well, if B—assume now we are talking of competitive theory—if his demand fell off, he would have to lower his price, and that lowering of price would stimulate new demand; that is, people would not buy at this new price, but if he lowered his price they would buy at a lower price.

Q. Well, how would he lower his cost of production in that situation?

A. Well, if he can't sell his goods he lowers his price. The cost of production in that situation would not control.

Q. I see. In that situation his price would not follow his cost.

A. I did not get you. Pardon me.

Mr. Gilpatric: Read it.

(Question read.)

A. No. If you have a temporary situation there where—

Q. No, I did not say anything about it being temporary. I have just taken the facts that you have.

A. Well, he has incurred costs there, but due to some change in the demand he can't sell his product at the price which he would like to do in order to recover the so-called

BLEED THROUGH – POOR COPY

cost, but if he can't do business at that price he has
6245 got to do business at some other price. That is the law of competition. If he does not recover all that he might have anticipated or desired he can't help it. If the demand falls out from under him, why, he has got to come down to this new demand situation, lower his price, in order to stay in business. That is the way you get these adjustments effected in a competitive economy.

Q. And it would not be consistent, would it, with your concept of competitive economy for a manufacturer in that situation to go out to some unrelated market where there is a demand and sell his product at a price that would leave him a margin over cost?

Mr. MacIntyre: I object to the question and to the entire line to which it goes. This is bringing out by rehashing the argument which was started yesterday afternoon.

Trial Examiner Norwood: I think you covered the point.

Mr. Gilpatric: Well, I will—after this question—

Trial Examiner Norwood: Let him answer this one. Objection overruled.

The Witness: State the question, will you, please.

(Question read.)

A. No. It would not be done in a competitive situation.

By Mr. Gilpatric:

Q. On Tuesday you testified, Professor Gray, in
6246 answer to a question that Mr. MacIntyre asked you, that a manufacturing company might seek to sell similar merchandise simultaneously in more than one place. Do you recall that?'

A. I do not recall the exact situation, the exact statement of that problem.

Q. Well, you were asked this question, page 6026:

"May a manufacturing company seek"—

Mr. MacIntyre: What is the page?

Mr. Gilpatric: 6026.

Q. I am quoting:

"May a manufacturing company seek to sell similar merchandise simultaneously in more than one place?"

And you answered on the following page:

"Yes, they seek to do so."

6247 Q. Do you now recall that question and answer?

A. Yes, sir.

Q. If such a company did seek to sell merchandise in

more than one place, in your opinion would the company necessarily receive the same net amount per unit for
6248 sales in each market?

A. Now, that, it seems to me, is not in accordance with my general position here.

Mr. Stewart: Keep your voice up.

Trial Examiner Norwood: A little louder.

A. I think the question does not make my position clear. In this previous discussion the question was whether one may seek to do it, without specifying any particular place or where that destination might be with respect to this market place that I have been discussing.

Q. Do you want to change your answer which you gave to Mr. MacIntyre?

A. I think the answer is correct if you do not lift it out of its context.

Q. Well, do you want to explain it?

A. Yes, I will be glad to.

Q. What do you think it needs by way of explanation?

A. I think it needs to be taken in conjunction with the matter we are talking about, the nature of the market, and a manufacturer might seek to sell, but my whole contention was that in a competitive state he was limited by his natural freight advantage territory. Now, presumably he could sell at any place in that market area where he has the advantage, but that is not to say that he could go out anywhere and do it. You have got to locate these destinations you are talking about, either in the market area
6249 where he has the advantage or at some place where he does not have the advantage, and where he is shipping into somebody else's natural territory.

Q. Well, can you conceive of any circumstances which would be consistent with your concept of competitive economy under which a manufacturer could receive varying mill nets?

A. No, sir.

Q. Do I understand you, then, to mean that varying mill nets can never result from competition?

A. That is correct. I hold that the theory of competition makes for uniform price.

Q. When merchandise is sold at a delivered price and there is an absorption of freight by the seller, does that indicate to you as an economist the presence or absence of competition?

BLEED THROUGH – POOR COPY

A. I have discussed that before and pointed out that I regard that as a—as not a competitive practice.

Q. Do you find in principle any grounds for distinction between the practice of absorbing freight under the basing-point method of pricing and the practice of absorbing freight when other delivered price terms are used?

A. I confess I don't know what you mean.

Q. Well, is your objection to the practice of absorbing freight limited simply to the existence of that practice under the basing-point method or system, or would
6250 you object to it no matter what the system of pricing was?

Mr. MacIntyre: Now, I think that it is only fair to the witness that the counsel explain to the witness at this point what he means by the term, as used in his question, "absorbing freight."

Trial Examiner Norwood: Objection overruled.

A. I don't know what you mean by "other practices." You have referred to the thing that we have been talking about, the absorption of freight in the delivered price system, and I have made my position clear, I think, on that. Now, you have raised some other system, and I don't know what you mean on that.

By Mr. Gilpatric:

Q. Any other system of pricing than the basing point.

A. You mean any other system that absorbs freight?

Q. Yes.

A. Well, then, that absorbs freight and that is discriminatory and not in accordance with competitive theory.

Q. And there is no difference in principle between—

A. The principle is the discriminatory principle as distinct from the uniform price principle. That is the principle that is concerned here, and the method by which one might achieve such a thing is quite a different problem.

Trial Examiner Norwood: You can't absorb freight without discriminating in price; is that your theory?

6251 The Witness: That is my contention, yes.

By Mr. Gilpatric:

Q. In your conception of competitive economy, does competition exist where one seller of a standard commodity merely meets—that is, makes his price the same as—the price of a like seller in the same market, or is it essential, in your opinion, for competition to exist that the one seller makes his price lower than the other seller?

A. Now, we started with one seller in a market and pretty soon we had two sellers. It is confusing. You shifted your use of a market there, as I understood your statement.

Mr. Gilpatric: Read the question.

Trial Examiner Norwood: Read it.

(Question read.)

The Witness: I submit, Mr. Examiner, we have a contradiction here. We start out by saying there is a single seller in a market, and—

Q. Now, just answer this question:—

Trial Examiner Norwood: I think that is rather clear, Doctor. A single seller is selling—

The Witness: Well, then, but—

Trial Examiner Norwood: —and he is relating it to the price of a competitor there.

The Witness: He starts out to say—

Trial Examiner Norwood: No contradiction there.

6252 He makes one statement about a single seller, and then he brings another seller into the picture in a perfectly normal way.

Read the question.

(Question re-read.)

A. I will have to answer the question on the assumption that we have two sellers in a competitive market. In that case these two sellers would be competing for business, and the price would be fixed as result of the supply situation as represented by the relativity of these two sellers.

Mr. Gilpatric: Now, Mr. Examiner, I want an answer to that question, whether or not the facts I have given you correspond to competition in your conception or not.

Mr. MacIntyre: Well, now, if Your Honor please, I object to counsel putting a witness without any assumption in it as to whether the market that is being referred to is competitive or monopolistic and then insisting that the witness may not in his answer assume either for the purposes of the answer.

Trial Examiner Norwood: He is trying to find out whether he considers it competitive or not.

Mr. MacIntyre: Well, the witness started to answer on the basis—

Trial Examiner Norwood: Objection overruled.

Mr. MacIntyre: —of one assumption.

Trial Examiner Norwood: Objection overruled, I

6253 think the witness should answer that question as it stands.

ELEED THROUGH – POOR COPY

A. Well, assuming now that there are two sellers and two—

Trial Examiner Norwood: Is it competition when one seller merely meets the price of the other?

The Witness: Not if this second seller comes in there, that is, into the natural market center of the other, by some discriminatory practice. I should not regard that as competition.

Trial Examiner Norwood: Well, is it necessary to competition that one seller sell lower than the other?

The Witness: No. In competition you tend to get a uniform price.

Trial Examiner Norwood: Well, what is your answer there? "Yes" or "no."

The Witness: The two sellers selling in a competitive market get the same price, uniform price.

Trial Examiner Norwood: Can't you answer my question "yes" or "no"? Is it necessary to competition that one seller sell lower than the other seller?

The Witness: No.

Trial Examiner Norwood: Thank you.

By Mr. Gilpatric:

Q. In other words, it is consistent with competition if the one seller merely meets the price of the other seller?

A. The price would be uniform in a competitive market.

6254 Mr. Gilpatric: Read the question.

(Question read.)

Q. Just "yes" or "no."

The witness:. Mr. Examiner, must I answer "yes" or "no" to that?

Trial Examiner Norwood: If you cant's answer it that way, answer it some other way.

A. I can't be sure of my ground because I don't know how this—whether the two producers—

Trial Examiner Norwood: Are you assuming that all the other elements of competition are present?

Mr. Gilpatric: Yes.

Trial Examiner Norwood: You can answer that "yes" or "no," can't you?

The Witness: Will you please explain whether there are two producers in this market?

Mr. Gilpatric: Now, the Examiner asked you the question.

The Witness: Pardon me.

Trial Examiner Norwood: Read the question.

(Question re-read.)

Trial Examiner Norwood: Now, is that the case, assuming that all other elements of competition are present? Can't you answer that "yes" or "no"?

A. Yes.

6255 By Mr. Gilpatric:

Q. If a particular manufacturer improves the quality of his product instead of whittling the price, is the result effective competition, in your opinion?

A. That is not what I define as price competition. It has some effect, but it is not effective competition, as I used the term in my testimony.

Q. You say it is not effective competition?

A. It is not what I defined effective competition to be.

Q. In a competitive market would you expect the seller of a product such as a rigid conduit to be raising and lowering his price quotations each time an attempt is made to effect a sale?

A. No, I should not expect that. You could have in a competitive market—you would not have an infinite number of changes over a period of time. You would have frequent changes, but not every time a sale is made.

Q. In your opinion, what would be likely to cause a change in the price quotations for such a product?

A. It would have to be some—some fundamental change in the demand and supply conditions in that market. Then the price would then necessarily change if there was competition.

Q. And I take it you don't subscribe to this theory that is referred to in some economic textbooks as elementary theory of biggling over price?

6256 Mr. MacIntyre: I object to the question. It is argumentative.

Trial Examiner Norwood: Overruled.

A. Well, that is a figure of speech, of course. In practice you do have this continuous bargaining.

Trial Examiner Norwood: Off the record a minute.

(Discussion off the record.)

Trial Examiner Norwood: Back to the record. Proceed:

BLEED THROUGH – POOR COPY

By Mr. Gilpatric:

Q. Assume that two manufacturers of conduit located at a point other than Pittsburgh yesterday published price cards for conduit, and in accordance with those price quotations, price cards, each of the manufacturers sold a hundred feet of half-inch galvanized conduit to a customer in New York at a delivered price of $5, the price being determined by adding freight from Pittsburgh to New York to the prices named in the price cards. In making those sales, were such manufacturers employing the basing-point method, in your conception of that term?

Mr. MacIntyre: May we have that question read?

(Question read.)

A. I think they were.

Q. Assume that today the first of such manufacturers publishes a revised price card, and in accordance
6257 therewith sells a hundred feet of half-inch galvanized conduit to a customer in New York at a delivered price of $5.10 determined in exactly the same manner as the sale made yesterday; the second manufacturer continues to sell a hundred feet of the half-inch galvanized conduit at a price of $5 delivered in New York City. In making such sales, are those two manufacturers still using the basing-point method, according to your concept?

A. As I understand it, they are. They are using the Pittsburgh base in the second instance as in the first, and the difference there would be—assuming the freight is constant, the difference would be in the base price—their—no. No. The base would be—they are using the Pittsburgh base. There is a difference there. One of them is shading the price, it seems to me. They are using the Pittsburgh base, as I understand your proposition, on shipments to New York.

Q. Well, one of them has increased the price so that the delivered price in the case of one manufacturer at New York is $5.10 per 100 feet of half-inch galvanized conduit, and in the other case it remains at $5. Now, do you want to change your answer to that?

A. I don't see how, if they are using the same base, the freight is the same, they could have anything other than an identical price. Now,—

Q. Now, there again, you are criticizing my as-
6258 sumption. Just take the assumptions as I gave them to you, namely, that the first manufacturer revised

his price card so that as a result of selling conduit under the price card he received $5.10 as against the other manufacturer's receiving $5. Are they selling in accordance with the basing-point method?

A. I don't understand what you are getting at because, in the first instance, you told me that they both used a Pittsburgh base and now you have introduced some different arrangement there which—

Q. No; they are both publishing price cards and they are quoting prices determined by adding freight from Pittsburgh to New York. The only difference between the second situation and the first is that one of the two manufacturers have revised his price quotation as a result of which he receives 10 cents more.

A. Well, to that extent he has departed from the Pittsburgh base, then, it seems to me.

Q. Well, is he using the basing-point method of pricing?

Trial Examiner Norwood: What did he revise it to? Is he using the base price at Pittsburgh, or where, what?

6260 Mr. Gilpatric: All right.

By Mr. Gilpatric:

Q. Assume that on January 10, 1941, a manufacturer of conduit located at New Kensington, Pa., publishes a price card which represents an advance of 5 per cent over

6261 his previously published price card and a similar advance over the previously published price cards of all other conduit manufacturers. Is that manufacturer in selling under his revised price card using the basing-point method of pricing?

Mr. MacIntyre: Now, I submit that—

Trial Examiner Norwood: Now, wait a minute, now. Please let the witness answer that question.

Do you object to the question?

Mr. MacIntyre: Yes. May I state an objection?

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: I object to the question on the ground that it does not state a situation to which an answer could be made.

Mr. Gilpatric: I will add to that question:

By Mr. Gilpatric:

Q. Under the facts set forth in hypothetical question A.

Mr. MacIntyre: Now, you have done something else.

BLEED THROUGH – POOR COPY

Trial Examiner Norwood: Now, can you answer that question as amended?

A. Well, I should say he is, then, under the hypothetical assumption.

Q. Are the other manufacturers of conduit in that situation who do not increase their prices on their price cards also using the basing-point method?

A. Under the hypothetical assumption, yes.

6262 Mr. Gilpatric: That is all the questions I have, Your Honor.

Trial Examiner Norwood: Any further questions on cross-examination?

Mr. Austin: I understand Mr. Stewart wants to ask a few, but I would like to get enlightened here on a couple of questions if I may.

Trial Examiner Norwood: Go ahead.

By Mr. Austin:

Q. Professor Gray, will you tell me, please, what is recognized and accepted economic theory?

A. I think you would find that question very difficult to answer.

Q. Will you speak a little louder.

A. Pardon me.

I think you will find that question rather difficult to answer. Economists disagree on a great many things. There are certain fundamental things that I—I think they do agree on, and in my statements here in this testimony that I thought economists agree pretty well as to what constitutes a competitive market, there I have reference to the discussions in the form of scientific literature. I think they agree on such things as that. Now, you find, of course, a great deal of disagreement on particular points of doctrine and methodology, and so on.

6263 Q. Now, Professor, when you answered questions on direct examination put to you by Mr. MacIntyre which contained the phrase "recognized and accepted economic theory," did you mean in your answer that there was no difference of opinion as to the answer?

A. I think my answer was addressed to this concept of a competitive market.

Q. I am not asking you that, sir.

Trial Examiner Norwood: Answer directly, if you will.

A. Well, I didn't mean a recognized agreement on every

subject in economics, no. I was trying to narrow it down to this one.

Q. Now, I am very serious, I am trying to be enlightened. I want you to tell me so that I will understand what you meant when I read this record. Mr. MacIntyre put to you questions in which he said, "Is it recognized and accepted economic theory that thus and thus is so?" Your answer was either "yes" or "no." Now, you may have qualified your answer to some extent, but to by recollection you never qualified it as to the opinions of other economists. Therefore, I now ask you what you meant by "recognized and accepted economic theory?"

A. If you will read my whole testimony I think you will find that I tried to make it clear that in discussing
6264 concept of competitive market that there was a recognized body of formal scientific literature.

Trial Examiner Norwood: He is asking you what you meant by "recognized and accepted." Did you mean that that was the unanimous opinion of all economists, or did you mean that a substantial number agreed with it, or just what was the—

The Witness: I meant there was a general consensus of judgment among economists about the nature of a competitive market.

By Mr. Austin:

Q. Does that mean that every answer that you have given on direct and cross-examination is limited by your concept of a competitive market?

Mr. MacIntyre: I object to that. It goes to too many answers and too many questions for anyone to be in a position to answer that without reference to them.

Trial Examiner Norwood: Read that question.

Mr. MacIntyre: Over three days of testimony here.

(Question read.)

Trial Examiner Norwood: Objection overruled.

A. Of course, I am the one testifying and I have to present my own ideas, but I think my own ideas are—with respect to competitive markets are pretty much in agreement with most other economists on the general pat-
6265 tern of a competitive market.

Does that help you?

Q. Now, I respectfully submit, sir, that you are not answering my question.

Trial Examiner Norwood: Read the question again.
Mr. Austin: It is simple.
(Question re-read.)
Trial Examiner Norwood: I don't know— Off the record.
(Discussion off the record.)
A. I cannot commit others. I can only say that I think my answers are in accord with a sort of a general idea among economists about the nature of competitive markets.

By Mr. Austin:

Q. But, Doctor, I have not asked you about others in this question. I have asked you about the answers to the questions put to you.
A. Yes. Now, what do you want to know about my answers?
Mr. Austin: Read the question.
Mr. MacIntyre: I ask again that he point out the answer that he is referring to.
Trial Examiner Norwood: Off the record.
(Discussion off the record.)
Trial Examiner Norwood: What is the state of the record?
6266 (Record read.)
Trial Examiner Norwood: Now, I will ask you to answer that original question.
Read it.
(Question read as follows:
"Q. Does that mean that every answer that you have given on direct and cross-examination is limited by your concept of a competitive market?")
Trial Examiner Norwood: Is that right or not?
The Witness: I think yes.

By Mr. Austin:

Q. Now, sir, yesterday, I think it was, you made a statement, which reads as follows: "Competition exists under the rules of the game."
Do you remember making that statement?
First, what kind of competition were you then referring to?
A. I was referring to free competition. Free competition.
Q. Does that mean perfect competition?

A. No.

Q. Does that mean effective competition?

A. Yes.

Q. Now, were you speaking as an economist when you made that statement?

A. I was trying to.

6267 Q. Then, I can assume that rules of the game, as you meant them in that statement, have been developed and are known by economists?

A. Yes. We simply have to take account of them.

Q. Now, will you tell me what the rules of the game are, as an economist?

A. Well, we have the general idea that freedom of opportunity, freedom of enterprise, freedom of access to markets, open bargaining in markets. Now, none of those things exist in a disorderly world. There has to be order and system in order to have this free and open bargaining, and the rules of the game are those customs, traditions, and laws that surround the market and govern the operations of it. That is what I had in mind. It is the general framework of custom and law within which we all live and operate and which most people recognize and try to live up to.

Q. You are speaking of economic law, of course.

A. No, not in the sense you meant. The rules of the game are the whole framework of law and custom and social regulation within which economic activity is carried on.

Q. So that effective competition must exist—as a concept can only exist in relation to society?

A. Yes. Yes. It could not exist any other way.

Q. Now, does that exist in relation to a more or less esoteric society that you dream of or to a society that

6268 you observe?

A. No, certainly not the former. It is the latter. It is a society that we observe and study. It is not perfect, of course, but men do have a general idea of what is fair and reasonable—

Mr. Stewart: Keep your voice up.

A. —of what is fair and reasonable and decent conduct among men. Most of us accept that. That is a part of our training.

Q. I think you are right about that. That means, then, that I can assume that anything that is not effective competition is indecent conduct?

BLEED THROUGH – POOR COPY

A. No. I thought I made myself clear on that.

You have all sorts of imperfections. Some of them are quite impersonal, such things as ignorance of people, lack of proper information, lack of understanding of markets. Now, that is not something that was the fault of any particular plan of things. It is because people themselves are imperfect. So you have some types of imperfections, custom and tradition and law which would limit the operations of a competitive system, and then you have another kind where you have definite agreements and understandings and schemes of one kind or another to restrict the operations. Now, it is that latter type that are usually looked upon as something quite different from the first, which
6269 are more or less impersonal, not attributable to any agreement or understanding on the part of anyone.

Q. Will you cite to me any authority in which I could find the economic rules of the game written down and explained, as you have used the phrase here?

A. I should think not. I think you would have to piece it together from a great many sources in order to get a total picture of it. You would find, of course, a lot of it in your own field, law, an enormous amount of it.

Q. I wonder if the rules of the game, as you have used the phrase, might be considered by you synonymous with the phrase "fair competition."

A. I think my idea there would be much broader. It would include a lot of other things besides the things that might be technically defined as unfair competition. That has come to have a rather technical meaning. Now, there might be other things which would lie somewhat out of the area of unfair competition.

Q. Now you have shifted phrases, haven't you?

A. No, I think not. I was trying to answer your question about the—

Q. You used the term yesterday "minor imperfections" in competition. Do you remember using that?

A. Yes, sir.

Q. Could you give me an example of a minor imperfection?

6270 A. Well, let us take, for example, a lack of information on the part of certain buyers in a market. Now, if the majority of them are pretty well informed as to what is going on, the fact that a certain proportion of them might be badly informed, or erroneously informed,

that I should regard as a minor imperfection. It would not be serious enough to change the whole situation.

Q. It would not be serious enough to remove that market from having what you call effective competition; is that right?

A. That is right.

Q. Now, I just have one or two more questions.

I understood you to say that if you went on an f.o.b. mill price system you would have definite local monopoly. Is that correct?

A. Where there was one mill in an area, yes.

Q. Well, even if there were two mills there would be a monopoly, wouldn't there?

A. Not if these two were competing against each other for business, in respect to production cost, improving their methods. If they were actively competing, that would be competition limited only to two.

Q. Taking your assumption of one seller in the producing market, one producer in the market, and taking your statement that that seller would have a local monop-
6271 oly, would you consider that a minor imperfection?

A. No. Well, that goes to a point where it might be a major imperfection in the market. My answer there would have to depend upon just what monopoly power he has. We have been talking about freight advantage. Now, there might be other sources of monopoly power which would be even stronger than that. There might be cases where local monopoly might be almost, oh, relatively insignificant in the sense it did not hinder competition a great deal, but there was a lot of outside pressure, and a lot of those are so generally accepted that we never even think of them. The corner drug store,—well, that is a monopoly location.

Q. Well, let us get down to a couple of facts and that will clean me up.

You have a producer—and let us make it one of the heavy goods industries, so your freight is fairly high. Let us say he is located in Dallas, Texas, and his nearest competing producer is in St. Louis. And let us say, eliminating all the other types of monopolistic advantage he might have, that the sole advantage is the freight advantage. Now, in that area, which is his by the freight advantage, he has a local monopoly, does he not?

A. Yes.

BLEED THROUGH – POOR COPY

Q. In that instance would you call that a minor imperfection?

6272 A. No. I should think that is—that approaches a major imperfection. It would be limited there by their relation to each other. If they were really competing, pushing against each other, as I think you meant to imply, then I would say, well, that is the best that you can get; why, you have that situation. Now—

Q. I am perfectly willing to agree with you that that is the best you can get.

A. Whether it is major or not, that is not important. That is the best you can get.

Q. In other words, you stopped me in this trend of thinking, because I am coming now to whether or not, if you believed that to be a major imperfection, you felt that effective competition existed within the local monopoly area.

A. No. No. I think I pointed out that within your local monopoly area you would not have effective competition. If you were really going to solve the problem, you would simply have to get more producers in that area—Dallas and St. Louis.

Q. So that in that particular set-up that we have discussed you have eliminated your alternative choice of sellers, by definition.

A. Yes.

Q. You have eliminated price competition in the sense of the other fellow being able to come in, under your concept, and sell in this local monopoly area.

6273 A. Well, it would not be complete elimination there. As I tried to explain, that pressure would force this producer to try to get his cost down and try to keep his prices down; otherwise he will lose customers and lose business. Now, it would not be, of course, price competition in anything like a perfect sense, but there would be pressure on prices there—some.

Q. Now, that pressure is indirect pressure, isn't it?

A. Yes. It is a pressure—

Q. It is a roundabout thing. It comes and pushes him from behind into lowering his prices—

A. To keep his business.

Q. Rather than have a buyer come to him and say, "X will sell me this at his price." That does not happen to him, does it?

A. No. It is to keep his business, his customers.

Q. Just "no."

In that local monopoly area a buyer would not come to him and say, "X company up in St. Louis will sell to me for less than you are now selling me."

A. Well, he might do that if that St. Louis price—of course, the freight would put the goods in his home town cheaper than—

Q. No. You are getting away from my assumption.

A. You are not assuming that?

6274 Q. No. You know the assumption just as well as I do. Now, what is the answer?

A. Well, if the man with whom he is talking knew it was untrue, he would not pay much attention to it.

Q. Now, in that situation, then, in the heavy goods industries, if you compared—and speaking entirely of your concepts—a basing-point system of pricing and this system of pricing, you would have a choice between two ineffective systems of competition; right?

A. Yes. One I should regard as—

Q. I will ask the next question:

The fact is, of course, that you as an economist regard one of them as a little less ineffective than the other.

A. That is correct.

Q. And one more thing and this ends it.

Let us assume that a seller has a product which he sells for a dollar; that the quality of that product stayed the same for two years; that he then cheapens the product so that it is worth half of what it was worth before and sells it for a dollar. Has he changed the price of the product?

A. Yes. The price has been changed from two dollars to one dollar in your assumption.

Q. Well, then, as I understood your testimony, he is nevertheless, in spite of the fact that he has changed

6275 the price, not engaging in price competition?

A. No, I don't think I said that. He has made a new product here.

Q. Mr. Gilpatric asked you a question which caused mine, because your answer confused me. It was not as specific as mine, but was pointed toward the same end, and you said that that was not price competition in your view.

A. No. I think we were talking about a different matter there, where the price was held constant, and there was some rivalry in respect to the qualities of goods.

BLEED THROUGH – POOR COPY

Now, here we have a different picture, you see. You changed the whole character of the good. It is simply not the same thing it was before. And it is now only a dollar whereas formerly it was two dollars.

Q. Well, let us get clear here. Suppose I varied my example from a change of 50 percent in the value of the product to a change of 5 percent; that is, he cheapened it by 5 percent, but it looked the same. Would he be changing the price of the product?

A. There again you have got a different product, and presumably because it is cheaper it cost less to produce it. It is a different product.

I think I see what you are driving at, but I think you have got the wrong example. You are talking about—

Q. You don't like my example?

6276 A. Well, you have changed the price there because you have changed the product.

Q. Well, is that price competition?

A. No. No. I think if you are talking about price competition you have got to assume that the thing you are talking about, namely, the commodity, remains the same.

Q. Remains the same.

A. Yes, remains the same.

Mr. Austin: That is all.

By Mr. Stewart:

Doctor, I take it from your statement of qualifications that your experience has been entirely along academic lines.

A. Yes, Mr. Stewart, that is correct.

Q. You never had any practical experience at all?

A. No. I have been in academic work for many years.

Q. Now, I gathered from what you told Mr. Austin that you would readily concede that the subject of economics is more or less a collection of theories; is that correct?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. Stewart: All right, we will go to something else.

By Mr. Stewart:

Q. You said that you had read considerable litera-

6277 ture on the subject of Pittsburgh Plus. Will you tell us what you have read on that subject?

A. I read the literature of the period, that is, when the case was under consideration, the arguments and articles, a part of the record, and the whole major discussion, books and articles and documents about that time when that thing was under consideration.

Q. Well, have you read Dr. Fetter's book, "Masquerade of Monopoly"?

A. Yes, sir; I have read that.

Q. Did you get any of these phrases you have been using from Dr. Fetter's book, like "effective competition"?

A. I can't recall that I did. Those words are such common usage, and I have been using them for so long that I do not want to lay the blame on Dr. Fetter.

Q. I see.

Now, have you read the proceedings before the Temporary National Economic Committee on the subject of the basing-point practices?

A. I have examined—

Mr. MacIntyre: Just a moment. I object. We are going into specific writings and specific reports, bringing them into this case. We are going to have quite a long redirect, because it so happens we have those reports, and if anything goes in on cross I am serving notice now
6278 that I am going to attempt to get a full explanation, including the portions necessary to explain them.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Five minutes' recess.

(There was a short recess taken.)

Trial Examiner Norwood: Proceed.

Mr. Stewart: What was the question?

(Question read.)

Trial Examiner Norwood: Objection overruled. Answer the question.

A. Yes, I have read them.

By Mr. Stewart:

Q. Do you find yourself in agreement with the statements in that document by the representatives of the Federal Trade Commission in their definitions of the basing-point formula?

Mr. MacIntyre: I object, unless the statement in question—

Trial Examiner Norwood: Objection sustained.

BLEED THROUGH – POOR COPY

Mr. MacIntyre: —is pointed out. It should not be brought in here anyway.

By Mr. Stewart:

Q. I will ask you this, then: Assuming this definition of the basing-point formula occurs in this document I have referred to at page 14550, speaking of the basing-
6279 point formula—

Mr. Stewart: Can't I finish the question?

Trial Examiner Norwood: Go ahead.

Q. (Continuing.) "It is a formula"—

Mr. MacIntyre: Now—

Trial Examiner Norwood: I don't think you can.

Mr. Stewart: Why not?

Trial Examiner Norwood: You are putting something in the record there. You may ask him anything whether he agrees with any sort of principle that you will propound to him but not as coming from somewhere else.

Mr. Stewart: All right. I will strike the question.

Trial Examiner Norwood: And at this time I don't think the counsel should proceed with that after having announced where it came from. In other words, it is getting that in the evidence, you see, as such. I don't think that is a proper thing to do.

Mr. Stewart: I don't understand that but we will start on something else.

By Mr. Stewart:

Q. Is there anything in the principles of economics which enables an economist to determine whether under a given set of facts there has been an agreement or collusion among producers, or is that just common sense?

6280 A. No, there is nothing in the principles themselves that would indicate that.

Q. Well, then, how do you as an economist determine whether or not under a given set of circumstances there has been collusion or agreement?

A. In my testimony I approached that problem this way: I said I can't conceive of how the basing-point system could arise under a competitive system because it is so completely different from a competitive system. Now, by process of exclusion there, if it can't arise out of the operations of a competitive system, according to competitive theory, then I can only draw the conclusion that it has

been prevented by some human arrangement or some understanding. That was the burden of my testimony, and I thought I made myself clear on that.

Q. Well, that is what I wanted to get clarified.

In other words, as I understand you, without anything more than the mere fact that certain producers use the basing-point formula, that that to you, in and of itself, without any evidence of anything more, spells an agreement; is that right?

Mr. MacIntyre: I object. It is not the statement of the witness.

Mr. Stewart: I am asking him. It is not for you to say. It is up to him.

6281 Trial Examiner Norwood: Let him state his objection.

Mr. MacIntyre: If Your Honor please, the question has in it a statement by implication that what the question is is the witness' testimony, which is contrary to fact.

Trial Examiner Norwood: I think not.

Read the question.

Mr. Stewart: This is cross-examination.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Objection overruled.

Answer that.

A. That is not quite a correct way to put my position. I have just said that if I can't explain something by the operations of the laws of competition I am forced to conclude, and there is no other conclusion I could logically come to, except there has been some type of arrangement.

Another approach to the problem is that one can observe how the basing-point system works, and from that derive the conclusion that it does not work according to competition, laws of competition, and that it works in ways which are—in my judgment, would be largely monopolistic. That is my general position.

By Mr. Stewart:

Q. Concretely, let us put the situation:

6282 Let us assume that a person starts in the manufacture of conduit, rigid steel conduit, in Pittsburgh, and for his own selfish purposes he concludes that the basing-point formula is a good one for him. Now, he is the only producer, and he buys his raw pipe from pipe

BLEED THROUGH – POOR COPY

manufacturers, who also have been using the basing-point formula of determining delivered prices.

Now, would you say from that that you as an economist would infer that there has been an agreement between that producer and the pipe manufacturer?

A. No, I would not think that would follow.

Q. All right.

Now, then, a man out in San Francisco decides that he wants to go into the conduit business as well. He never sees nor contacts nor communicates nor in any way has anything to do with the Pittsburgh producer of conduit, but he learns through other sources of the fact that the Pittsburgh producer is selling on a basing-point formula and for his own selfish purposes he decides that that is a pretty good way to make money, so he decides he is going to sell on a basing-point formula.

Now, from that would you say that there has been an agreement between the Pittsburgh producer and the San Francisco producer?

A. No. Under those stated assumptions there 6283 would be no agreement.

Q. There would be no agreement?

A. No.

Q. Well, then, absent any evidence other than the mere fact that numerous producers of conduit use the basing-point formula, would you say that that to you as an economist would mean that there had been an agreement between them to use the basing-point formula?

A. I don't see how you could come to any other conclusion. It seems to me that if a single manufacturer starts out with this method of pricing he would soon be invading the natural territory of others, and in the absence of any restraining influence they are certain to retaliate, and pretty soon you get a sort of a chaotic system of dumping and mutual retaliation, and then, it seems to me, you tend to get some agreement there by which the whole thing is stabilized and made mutual. That is the way I see it.

Q. Even though you have nothing more than the mere fact that they use a basing-point formula you conclude that, without any evidence of any agreement other than that fact, that there must be an agreement; is that it?

A. No. No. That does not correctly state my position. I arrive at the conclusion by a logical analysis that this

system does not conform to the behavior pattern of a competitive system, and I am not able to see how
6284 it could come into existence and continue to exist within some mutual understanding.

Q. Well, I have asked you to assume that they never see each other, they never talk to each other, they do not agree in the sense that they communicate with each other; the mere fact is that they use a basing-point system. Now, I want to know how you as an economist come to the conclusion that there must have been an agreement despite the fact that I assumed that there was not any actual one.

A. There might be a sort of a system of mutual forebearance, or something, that is not in the sense of a formal agreement. I can't testify on the nature of that. But I can't see how the system would continue to operate unless there were some understanding. I make no statement as to the nature of it, you understand.

Q. Does the validity of your criticism of the basing-point formula depend to a material extent on your concept of the market being at the mill?

A. That is basic to my concept of a market, that you have a market at the place of production, you have buyers focussing their demands upon that market.

Q. Now, how many other economists besides yourself have that concept of the market being at the mill?

A. Well, as my knowledge of the literature and the writings of economists goes, I am under the impression
6285 that most economists in their formal analyses of this subject do regard the market—

Q. Well, would you be willing—excuse me.

A. Go ahead.

Q. Are you through?

A. —regard the market as a place where the buyers and sellers meet.

Q. Now, I did not ask you that question. I asked you as to what economists besides yourself entertain this concept of the market being at the mill.

A. I couldn't answer that, Mr. Counsel, without making a—

Q. Well, would you say it is the majority of them?

A. Well, I don't know that I can even answer that intelligently without making a careful canvass of all economists, and it is a quanitative answer that you expect me to give here, and I gave you my general impression.

BLEED THROUGH – POOR COPY

Q. Well, I don't want general impressions.

Trial Examiner Norwood: Would a substantial number of them agree with you on that point?

The Witness: I should think so; yes.

By Mr. Stewart:

Q. Well, then, I will ask you if you will furnish for the record a list of the economists who concur in your concept of a market being at the mill. Will you do that?

6287 A. Unless so instructed by the Examiner, I—I would not feel it part of my duty to make a systematic canvass of all that has ever been written on this subject by hundreds of economists and present a summary of that.

By Mr. Stewart:

Q. Well, Doctor, possibly I can help you.

(Respondents' Exhibit 336-A, B and C, marked for identification.)

Q. I am handing you Respondents' Exhibit 336-A, B and C, which purports to contain a list of authorities on the subject to which I have directed your attention, and I will ask you if overnight you will take this list and check the authorities there who agree with you.

Mr. MacIntyre: May I see the exhibit?

Trial Examiner Norwood: Yes.

(Counsel examining the exhibit.)

Mr. MacIntyre: Now, what is the question? May I have that read?

Mr. Stewart: I have asked him if he will take that list and overnight check the authorities who will agree with him on the subject of the market being at the mill.

Mr. MacIntyre: Yes, I know, but I want the ques-

6288 tion that went into the record prior to that.

Mr. Stewart: That is the question.

Mr. MacIntyre: No; about what this purports to be.

Trial Examiner Norwood: Wait a minute.

Off the record here now.

(Discussion off the record.)

(Last question read.)

Mr. MacIntyre: Now, if Your Honor please, I object to that question, first, on the ground that the exhibit which is referred to in the question does not purport to go to any subject except to carry in it titles to certain works or books by certain purported authors and not as to any

particular subject. Now, if we want the record to be c
on this, I think it should be made clear instead of mud
by statements as to what an exhibit purports to be v
it is not the fact.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. MacIntyre: If Your Honor please, I want to n
this statement on the record in further objection to
procedure.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: I want to say that it is highly un
not only to the witness but to the tribunal and to any
who reads the record, for the reason that this
6289 ticular procedure was used to mislead the Supr
Court in the case of the Cement Protective Manu
turers Association through having put into that re
through the testimony of T. S. Adams a statement cont
ing the names of witnesses—I mean the names of purpo
authors, so that by the time the case got to the Supr
Court it began to appear as if those authors had t
the stand and testified, in accordance with the testim
of Mr. Adams, and one of those who were so reputed
have testified in that case in accordance with Mr. Ad
was Dr. Frank Fetter, and he never was on the st
Consequently, I object to any such proposal being bro
here for the purpose or the apparent purpose of misl
ing this tribunal or any court on such matters of that k

Mr. Stewart: Well, now, when you accuse me of
ing to mislead anybody you are on rather danger
ground. Now, I am telling you that I have authori
here, at least 90 percent of whom are contrary to this
ness, perfectly respectful authorities, and when you
cuse me of misleading anybody I ask you to retract t
You, unfortunately, had been reading the language in
Masquerade of Monopoly, and you are misled by that.

Mr. MacIntyre: I am only asking that the record
what that exhibit purports to show.

Mr. Stewart: I ask the Examiner that any staten
counsel made as to me misleading the tribunal
6290 be stricken as being highly improper.

Trial Examiner Norwood: I don't think the cou
meant that there.

Mr. Stewart: The trouble is he is a little too free
his words.

BLEED THROUGH – POOR COPY

Trial Examiner Norwood: The counsel's reply there was very adequate.

Mr. Stewart: Now, it is a very simple matter, if this witness says he will not do that, it is all right.

Would he take this list—

Trial Examiner Norwood: I will overrule the objection and let the witness tell you whether he is willing to check that for you or not.

Mr. Stewart: That is right.

Trial Examiner Norwood: Answer the question.

A. May I see the list?

By Mr. Stewart:

Q. Yes (handing Exhibits 336-A to C to the witness).

A. May I answer?

Trial Examiner Norwood: Now, make your answer. Are you willing to check that or not?

Q. Let me ask you another question before you answer.

Trial Examiner Norwood: Let him answer that.

Mr. MacIntyre: What questions are we talking about here?

6291 Mr. Stewart: Now, wait. Sit down, will you, just a moment.

By Mr. Stewart:

Q. Doctor, do you recognize those names as recognized economic authorities?

Mr. MacIntyre: Now, I object to that.

Trial Examiner Norwood: Objection sustained.

Mr. Stewart: Now, the question is—

Trial Examiner Norwood: You may answer that other question there if you want to on or off the record. If you are willing to check that let him know.

The Witness: I will answer it on the record.

Trial Examiner Norwood: Go ahead. On the record.

A. Mr. Examiner, this list contains a large number of names of economists. As I understand the question, I am asked to take this list and overnight produce a statement as to how many of these economists, which I would judge to be something over a hundred here, or nearly a hundred, agree with my conception of a market.

Mr. Examiner, I submit that that is an impossible request. If I had a staff of ten people working a month to make a digest of all that some of these men may have said

on the subject, I might get in such a report, but to ask that to be done overnight is simply impossible.

By Mr. Stewart:

6292 Q. Well, if I were willing to give you all the time you needed, would you do it?

A. I don't think that it is necessary for my testimony. I stated my views, and the views of these other gentlement, I think, are not vital to my testimony.

Q. Well, you have stated with some regularity throughout this record either that it is a part of economic opinion or it is the general opinion of economists that so and so is the situation, and, as I understand it, one of your answers was along the similar line as to a market being at the mill. Now, I am trying to find out how many economists make a general consensus of opinion among economists.

A. To get an exact statistical measure you would have to take a census of all economists and all that they have ever written in order to come to an exact determination of just how many say this and how many say that. That is an impossible assignment.

Q. I think you will agree that there is a very marked difference of opinion among very eminent economists on the subject, don't you?

Mr. MacIntyre: What subject are we talking about?

Mr. Stewart: He knows.

Trial Examiner Norwood: Of a market.

Mr. Stewart: Yes, that is it.

Trial Examiner Norwood: Proceed.

6293 A. Yes, there is difference of opinion, but I have insisted all along that I was stating the theory of competition. I think there is perhaps a certain general sense of judgment about what constitutes competitive market. There may be difference of opinion on a lot of other phases of economic questions.

Q. Well, your competitive market is the market at the mill; is that right?

A. At the place of production, yes.

Q. Now, you have just said there is a general consensus of opinion on that, and what I want to know is who constitues a general consensus of opinion, you and who else?

Mr. MacIntyre: I submit that question has been answered.

BLEED THROUGH – POOR COPY

Trial Examiner Norwood: You have asked him to name those.

Mr. Stewart: And he will not do it.

Trial Examiner Norwood: That is to be considered with his testimony, and I don't see why it shouldn't end there unless he wants to add something further.

Mr. Stewart: All right. Then, I would like to ask this question:

By Mr. Stewart:

Q. Besides you and Dr. Fetter, who entertain that concept of the market, competitive market?

6294 Mr. MacIntyre: I object to that question.

Mr. Austin: On what ground?

Trial Examiner Norwood: Objection sustained. No evidence here about Dr. Fetter.

Mr. Stewart: Well, I will eliminate Dr. Fetter.

Q. Besides yourself, then, who agrees on that subject?

A. I think I am not in a position here to pass judgment on the views of other economists. I have made my own testimony—my own analysis.

Trial Examiner Norwood: Well, he is asking you as to factual matter, if you can recall anyone who takes that same position with respect to the market being at the point of production. If you recall some of them, tell us who it is, and if you don't, say so.

The Witness: I should think any of the books on the general principles of economics, I should think.

By Mr. Stewart:

Q. Well, tell us the name of one of them.

A. Taussig..

Q. Anyone else?

A. Well, there is a long list of writers on general principles, and to state what each one said about every aspect of market operations is impossible.

Q. I am not asking you that, sir. I am asking you one very simple little question. You have said here

6295 that the general consensus of economic opinion is that the competitive market is at the mill. Now, I am trying to find out who besides yourself constitutes the general consensus of economic opinion.

6296 A. My statement that there is a general consensus reflects my own judgment of the writings and litera-

ture which I have examined over a long period of time, and I don't think it necessary for me to start itemizing particular economists who agree with me.

By Mr. Stewart:

Q. Well, you cannot tell us anybody who agrees with you at the moment; is that right?

A. I could if I made a canvass of the situation.

Q. I would like to ask you if you agree with this, Doctor, as an economic proposition: A merchant cannot compete with another merchant unless he knows what he must compete against? Do you agree with that?

A. Well, it doesn't mean anything to me.

Q. All right. A knowledge of what his competitor is charging is the first step in competition. Do you agree with that?

A. A man would not be a very intelligent competitor if he did not know what was going on in the market in which he was operating.

Q. All right. It does not follow because one man knows the price which his competitor is asking and then he fixes the same price, that his action is by agreement?

A. Yes, I agree with that.

6297 Q. You do, and it would not make any difference how many did the same thing, whether it is one, two, or ten?

A. If each one acted independently. That is your assumption?

Q. That is right. So that the mere fact that the same prices are charged by any number of competitors, without knowing anything more, does not mean to you that there was an agreement on prices; is that right?

A. No.

Q. It is not right?

A. No. I will have to explain my answer. I have assumed a competitive price in the market was a uniform price and all sellers would sell at that uniform price. That was my general position.

Q. Well, now, will you go back to my question, please? See if you can answer that.

(Question read.)

A. No.

Q. Do you mean by that answer of "no" that from this

BLEED THROUGH – POOR COPY

set of circumstances I suggested in the question that you would infer there was an agreement?

A. I would infer from what you stated that it was a competitive situation and they all sell at the same price, and in that connection I would assume that there was no agreement; price determines the market.

Q. Now, Doctor, where price changes in an in-
6298 dustry over a period of years are announced at different intervals by different producers, and following such announcement at times all and other times some of the producers in that industry follow those announced price changes, does that indicate to you as an economist that there has been an agreement on prices between those producers?

A. No. On the basis of your statement, no.

Q. Now, are there any other factors in the basing-point formula which must be taken into consideration in order that it may operate successfully, other than the mere fact of price?

A. I confess I don't quite know what you are getting at, Mr. Stewart.

Q. Well, would you say that the basing-point formula is a method of pricing which when appropriately implemented and observed automatically produces identical delivered prices for all sellers at any given destination, that its success depends, first of all, upon the common requirement of each seller that purchases be made only at delivered prices and a common refusal to quote or sell f. o. b. mill? Is that your concept?

A. I think that is a general statement of the main skeleton of the system, yes.

Q. In other words, you have to have all those factors before the basing-point system really works?

6299 A. That is perhaps putting it a little too strongly. You might have those, substantially those, with something omitted, but I think that would give you a complete system.

Q. All right. Now, then, assume that in the rigid steel conduit industry one or more of the producers of rigid steel conduit will commonly quote f. o. b. mill. Would that indicate to you that the basing-point formula is not working in those instances?

A. No, not on the statement alone. Before I would attempt to answer there I would want to find out what the

situation was and why it was done, what the nature of the pricing situation was there. On the mere statement of fact one would be entitled to say that your example would constitute a departure from the system. Now, as to why that was done or any of the other factual questions, one would simply have to dig into it to find out.

Q. Now, in this f. o. b. mill method, which seems to appeal to you as being the proper method of selling a commodity such as rigid steel conduit, of course, that is purely a theoretical approach on your part; is it?

Mr. MacIntyre: I object to going into the f. o. b. system again. The Respondents have had three cross-examinations on that and have rehashed it enough, in my opinion, so that it is cumulative any further.

Trial Examiner Norwood: I agree with counsel in
6300 principle.

Anything special you want to bring out about this?

Mr. Stewart: Well, all I wanted to ask him was how he would make it work in the rigid steel conduit industry.

Trial Examiner Norwood: Objection sustained.

Mr. Stewart: Do you want me to finish today, or—

Trial Examiner Norwood: I have no preference about it. We can go on a little while longer.

By Mr. Stewart:

Q. Do you see any distinction, Doctor, between a delivered price and the use of the basing-point formula of delivered prices?

A. I think the delivered price is the essential feature of a system. You do have identical delivered prices and the use of a basing point plus the freight.

Q. Well, is your answer, then, that there is no difference between them?

A. Between the basing point and the delivered price?

Q. Yes.

A. Well, there is a difference. One is the basing point and the other is the delivered price at destination. I would say that they were different.

Q. They are different?

A. Yes.

Q. What is the difference?

6301 A. Well, as I understand the proposition we are discussing, you have a basing point, added freight, and you get the delivered price. Now, one is the starting

BLEED THROUGH – POOR COPY

point of your calculation; that is, the base, and the other is the final completion of your calculation.

Q. Well, there is a difference in method, that is all, then?

A. Well, one is the starting point on which the whole system of quotation rests, and then by using a uniform base plus the freight you arrive at the identical delivered price result.

Q. When you answered upon the basis of the hypotheses in the two sets of hypothetical questions, did you undertake to reconcile any contradictions in them?

A. Since the time began this morning, I tried to take the whole—view the whole picture as it was laid out there.

Q. Well, in other words, the fact that there were contradictions between the two sets of questions made no impression on you?

A. Well, one simply has to try to come to some general appraisal of the total situation as laid before you. That is all I could do.

Q. Well, but how did you appraise the situation when you had contradictions between the two questions? Which did you decide to take, one question or which set of facts?

A. Well, if you have contradictions in a situation
6302 you simply have to work them out as best you can and come to some over-all judgment.

Q. That is what you did as between those two questions?

A. That is right. I looked at the thing as a whole as it was laid out here.

Mr. Stewart: I think we might as well adjourn until in the morning. You have sort of cut my—I think I am almost through.

Trial Examiner Norwood: Finish your cross-examination if you can. We have got another half hour.

Mr. Stewart: All right.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Mr. Stewart: I am through, sir.

Trial Examiner Norwood: Redirect.

6306 *Redirect Examination by Mr. MacIntyre.*

Q. Now turning to this question that Mr. Gilpatric asked you about the assumed state of facts where a manufacturer with a mill at New Kensington, Pa., advancing a price 5 per cent, and in that connection using the

basing-point system, I will ask you to assume that shortly thereafter all of the producers of rigid steel conduit issued price cards also advancing their announcement of the Pittsburgh base price by a like amount, so that when you compared delivered price quotations computed from the cards of each at any particular destination they were all identical, is it your testimony that that is the use of a basing-point system, since that some of the mills were located at Pittsburgh and others were located elsewhere?

A. I should think it would be.

Q. You also told Mr. Gilpatric on cross-examination that it is not necessary for one seller to do more than to meet the price of another in order to have some competition.

6307 Did you have reference in that answer of yours to price competition? If so, explain.

(Laughter.)

Mr. Stewart: I object to that as leading.

Trial Examiner Norwood: Objection overruled.

A. Well, the confusion which arose in connection with that discussion was due to the fact that I could not understand from the question whether there was one seller in the market, and then somebody else shipping in and meeting that, or whether there were two sellers, and I don't think we ever got it straightened out very clearly, but certainly if there were two sellers in the market you would have a competition. If there was one—

Mr. Stewart: What was the answer? I can't hear you, Doctor.

A. (Continuing.) There were two sellers in the market you would have competition; not as full and complete as you would if you had a dozen sellers, but fairly active competition with two sellers. If you had only one seller in the market you would have a condition of local monopoly subject to the pressure of adjacent producers which would tend to prevent that local monopoly from taking advantage of its customers in a very serious way.

Q. If these two sellers or more who came into the market, however, continued to quote identically the same price, would any buyer have any alternative as be-

6308 tween any of the sellers on the matter of price?

Mr. Stewart: Now, I object, Mr. Examiner. It seems to me we have been all over this backwards and forwards.

Mr. MacIntyre: I thought Mr. Gilpatric and two or three others went into it.

BLEED THROUGH – POOR COPY

Mr. Stewart: That is cross-examination. They have a right to go into it, but you are going into it on redirect.

Trial Examiner Norwood: I think it is obvious that if the prices were the same he would have no alternative.

Mr. Stewart: That is right.

Mr. MacIntyre: It leads to another question that I am going to ask on it.

Trial Examiner Norwood: All right. Go ahead. Answer the question.

Objection overruled.

Mr. MacIntyre: If I don't get an answer to this question they would say, then, I can't ask the next question.

Trial Examiner Norwood: All right.

The Witness: Read the question again.

(Question read.)

A. I should say, no, where the quotations are identical he has no choice of price; that is, a buyer has no choice in respect to price.

By Mr. MacIntyre:

Q. Is it necessary for the buyer to have choices as
6309 to sellers on the matter of price in order to have price competition?

A. Yes, sir; I so testified in my direct examination.

Q. Would it be necessary to consider the answer that you have just given to that last question in order to give meaning and clarity to any questions that you answered on cross-examination concerning price competition?

Mr. Stewart: I object to that as not being a proper question. It does not mean anything. The witness has just said that he answered the question on direct examination; that is, the question that Mr. MacIntyre asked him just a moment ago, you see. Now, Mr. MacIntyre wants to know if what he said in answer to his questions on direct examination are to be taken as qualifying all his answers on cross-examination.

Trial Examiner Norwood: No. I think he has a right to show what the witness meant by the previous answers. That is the province of redirect.

Mr. MacIntyre: May we have the question read?

(Previous record read.)

Mr. Stewart: Now, what is it?

Trial Examiner Norwood: Do you understand the question?

The Witness: Yes, sir.

Trial Examiner Norwood: Objection overruled.

6310 Answer it.

A. That answer is "yes."

By Mr. MacIntyre:

Q. Throughout yesterday afternoon and for a big part of today there has been a discussion concerning this local monopoly where you have one producer by the nature of things in one area and one other producer in another area by the nature of things. Now, I am going to ask you to assume—

Mr. Stewart: What nature?

Q. —I am going to ask you to assume that instead of one producer, you have a number of producers, two or more—

Mr. Stewart: Where?

Q. —at this point A Mr. Robison talked to you so much about, and that you also have two or more, possibly a dozen, at point B that he talked to you so much about; and assume that they are engaging in competition among themselves in each of those markets and as between the markets. Is there any major imperfection presented to you in competition by that picture?

A. In that situation you would have, in addition to that two that Mr. Robison and I were talking about so much there, and the intermarket competition, you would have within each of these natural freight advantage territories internal competition.

Q. Well, can you point out in that situation any

6311 major imperfection; that is, on that set of assumptions? You have a group of sellers at each location, in the nature of things, all competing internally and externally?

A. I should think you would have a situation there which, if these people acted independently and—they would give you a pretty lively state of competition. The only limitation one might suggest would be the fact that in one area there are only two, whereas in the other there are, you said, a dozen, which would give you a more active situation in one area than the other, but on the whole I should think it would be a pretty competitive situation.

Q. Now, assume that in each of the areas you have quite a number of sellers who are producers, in the nature

BLEED THROUGH – POOR COPY

of things, in each of the markets, and that they are all competing internally, that is, among themselves in each of the markets, and they are attempting to compete as between the markets. Is there any major imperfection, on the basis of those assumptions, that you can point out?

A. No, I should think not.

Q. That is, in the competition involved?

A. Yes.

Q. Would you describe the situation thus presented as one of one of effective competition?

A. Yes.

Q. Now, on cross-examination, in response to a
6312 question asked you by Mr. Robison, you told him that business must operate at a profit to continue in existence. I am going to ask you in that connection this question: Did you mean by that statement that economic theory or practice is to the effect that competition will afford the highest cost or inefficient producer a chance to continue in business at a profit?

Mr. Stewart: I object to that as leading. Now, I think when it comes to redirect on a question like that, the question should be, "What did you mean?" and not telling him; what the difficulty is—

Trial Examiner Norwood: Read the question.

Mr. MacIntyre: I don't think that is suggestive of any answer. Of course, it is leading.

Trial Examiner Norwood: It just had the answer in it, didn't it?

(Laughter.)

Mr. MacIntyre: No; I think it could be answered either way, depending upon which is the proper answer.

(Question read.)

Trial Examiner Norwood: I will overrule the objection and let him answer that.

Answer it.

A. Competition would eliminate the high cost pro-
ducers. That is one of the standard results to be ex-
6313 pected from active competition.

Mr. MacIntyre: Well, may we go off the record a second?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Well, proceed, gentlemen, on the record.

Mr. MacIntyre: All right.

By Mr. MacIntyre:

Q. Now, returning again to this situation that Mr. Robison discussed with you so long yesterday afternoon about A at one market, B at another, on the uniform f. o. b. mill system at this point O, that is, in A's territory,—

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: Complete your question there.

Q. —with his assumption that B took some of the business from A at O, and thereby increased B's production so as to reduce his cost, his unit cost, what would you as an economist, on the basis of those assumptions, expect to happen to the level of the costs of A, assuming all other factors as being mutual?

A. Well, in that situation it would seem to me
6314 that B had in some way or another reduced his cost. He is able to extend toward this point O, which is in A's natural territory. Now, A has got to get busy and get in competition or do something about it. He has got to get his costs down or else that portion of his market will be taken away from him. If he can't meet that competition, why, he cannot hold his customers, so that the pressure of B would force A to get his cost down.

Q. And if he did not get his cost down so as to get any more business and continued to lose business through some factors which did not change or which he did not cause to change, what would happen to his cost then?

A. You mean if he kept on steadily losing business?

Q. Yes.

A. I think he would eventually probably have to go out of business unless he could effect some reorganization there to get his costs in lines with B's costs.

6316 Q. Well, in any answer that you gave to Mr. Austin in response to any of his questions did you mean to tell him that every one of your answers that you have given here have been limited by your concept of a perfect market?

A. I think that language isn't clear. What I was trying to indicate in that connection was that my whole approach has been from the point of view of competi-
6317 tive theory, and my whole analysis of problems has been from that point of view and my conception of

BLEED THROUGH – POOR COPY

a market, the nature of competition, the nature of price, and so forth, have been reflected in my judgments as to various questions that have been propounded here.

Q. Did you mean by any answer that you gave to him in response to any of his questions that when you spoke of a situation not being competitive that you meant by that it was not a state of perfect competition?

Mr. MacIntyre: Read the question to the witness.

Trial Examiner Norwood: Read it.

(Question read.)

Mr. Austin: If Your Honor please, I object to that question, first, on the ground that it is confusing and is not capable of an answer that will clarify the record to any extent at all, and, secondly, on the ground that I submit that I did my very best in my questioning of the Doctor to make plain what type of competition we were talking about, effective, perfect, free. In every question you will find that those terms are set forth plainly.

Mr. MacIntyre: Well, can't we find out now what he meant when he answered your questions?

Trial Examiner Norwood: Objection overruled.

Answer the question.

Mr. MacIntyre: Read the question to the witness.

6318 (Question read.)

A. No.

By Mr. MacIntyre:

Q. Will you state whether or not that you meant that—strike that.

Trial Examiner Norwood: Now, don't lead this witness any more.

Mr. MacIntyre: What was the statement?

Mr. Austin: "Don't lead the witness."

Trial Examiner Norwood: Don't lead him.

Mr. MacIntyre: All right. I will try not to.

By Mr. MacIntyre:

Q. Will you explain to us whether or not that you can have a state of effective competition without having a state of perfect competition?

A. I think I have outlined my views on that, that competition in order to be effective—

6319 A. (Continuing.) —must not necessarily be perfect.

By Mr. MacIntyre:

Q. Do you intend that all of your answers you have given on cross-examination be taken to that effect?

A. Yes.

Mr. MacIntyre: That is all.

Mr. Robinson: Mr. Examiner, before you close the
6320 record today may I have a minute to note a request on the record?

Trial Examiner Norwood: Yes, sir.

Mr. Robison: At the time when Professor Fairchild was testifying, as shown at pages 5165 to 5170 of the record, Professor Fairchild was asked to furnish references to statements of economic authorities concerning a certain question then referred to.

I ask that the record show that in response to that request I am now handing to Mr. MacIntyre, and I also hand a copy to the Examiner, a letter written by us at the request and in behalf of Professor Fairchild in which is listed the authorities such as Professor Fairchild was then requested to furnish, and I hand another copy to the Reporter and ask that the letter be permitted to go on the record.

Mr. MacIntyre: No. I object to it going on the record until I have had a chance to check it.

Trial Examiner Norwood: If it is noted on the record it becomes evidence.

Mr. Robison: I do not suggest that it go on the record as evidence of anything except that Professor Fairchild has, through this letter, responded—

Trial Examiner Norwood: Let him mark it for identification.

Mr. Robison: I beg your pardon?

6321 Trial Examiner Norwood: Let him mark it for identification.

Mr. Robison: All right.

Trial Examiner Norwood: And you might offer it later, you see.

Mr. Robison: I ask that it be marked.

Trial Examiner Norwood: 337-A and B.

(The document referred to was marked for identification "Respondents' Exhibit No. 337-A and 337-B.")

Mr. MacIntyre: Well, I would want to cross-examine Professor Fairchild on that before it went on the record, even if it were otherwise admissible.

BLEED THROUGH – POOR COPY

Mr. Robison: I am not asking anything but that the letter go on the record as evidence that Professor Fairchild has at least attempted to comply with Mr. MacIntyre's request.

Mr. Austin: May I ask a question off the record?

Trial Examiner Norwood: Yes.

Off the record.

(Discussion off the record.)

Trial Examiner Norwood: The witness is discharged and the hearing is recessed until 10 o'clock tomorrow morning, when we will meet in this room.

(Witness excused.)

(Whereupon, at 4:35 p. m., March 12, 1942, the hearing was adjourned.)

6323 PROCEEDING.

Trial Examiner Norwood: Hearing come to order.

Pursuant to adjournment on yesterday, the hearing in Docket 4452 is now reconvened in Room 532, Office of the Federal Trade Commission, Washington, D. C., at 10 o'clock a. m., Eastern War Time, on Friday, March 13, 1942.

Please note the appearances.

Call your witness.

Mr. MacIntyre: Call as the next witness Dr. Loucks.

WILLIAM N. LOUCKS was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Trial Examiner Norwood: Proceed.

Direct Examination by Mr. MacIntyre.

Q. Does the Reporter have your full name?

A. Yes. William N. Loucks, L-o-u-c-k-s.

Q. I hand you a statement, Dr. Loucks, entitled "Statement of Qualifications of William N. Loucks As an Economic Expert," and will ask you if you have read that and know what it contains?

A. Yes, I have read this.

Q. Is that a correct statement of your qualifications?

A. Yes, that is correct.

6324 Mr. MacIntyre: I ask that that be incorporated in the record as a statement of the witness of his qualifications.

Trial Examiner Norwood: It may be entered in the record and taken as the testimony of this witness.

(The statement referred to is as follows:)

My present position is that of Professor of Economics, Wharton School of Finance and Commerce, University of Pennsylvania, Philadelphia. I have been teaching in the Wharton School of the University of Pennsylvania since 1923 as Instructor, Assistant Professor, Associate Professor, and Professor. At various times I have taught Economics at the Drexel Institute of Technology, Philadelphia, and have been Lecturer in Economics at Swarthmore College, Swarthmore, Pennsylvania.

My training in Economics began as an undergraduate student majoring in Economics at Heidelberg University, Tiffin, Ohio (A.B. 1922), and was continued as a graduate student at Ohio State University (A.M. 1923), and the University of Pennsylvania (Ph.D. 1928).

Among the governmental and other public projects with which I have been connected are the following: Member of Correlating Committee on Legislation and Administration of the President's Conference on Home Building and

6325 Home Ownership, 1931; Director, Staff of Special Advisers, Consumers' Advisory Board, National Recovery Administration, 1933; Coordinator, Civil Works Administration Surveys, Philadelphia, 1934; Director of Planning Division, State Emergency Relief Board, 1934; Coordinator of Statistical Projects for Pennsylvania, Works Progress Administration, 1935; Member of Research Staff, Mayor's Advisory Commission on Finance, Philadelphia, 1938; Economic Consultant, Temporary National Economic Committee, 1940. In the latter capacity I assisted in the preparation of the Temporary National Economic Committee Monograph No. 21, entitled "Competition and Monopoly in American Industry."

Among my publications are the following:

Books and Monographs:

The Philadelphia Plan of Home Financing: A Study of the Second Mortgage Lending of the Philadelphia Building and Loan Associations.

The Stabilization of Employment in Philadelphia through

BLEED THROUGH – POOR COPY

the Long-Range Planning of Municipal Improvement Projects.

The Second Mortgage Situation in Philadelphia. Contemporary Economic Problems. (Joint Author) My chapters were those on "Monopoly" and "The Social Control of Business."

Comparative Economic Systems—Capitalism, Socialism,
Communism, Fascism, Cooperation. (Joint author
6326 with a colleague).

Articles published in periodicals:

Price Margins during a Period of Prosperity. Increments in Land Value in Philadelphia. Profit Margins as Business Forecasters. The Philadelphia Building and Loan Association Plan of Financing by Second Mortgages.

The Unearned Increment in Land Values and Its Social Implications.

Price-Fixing: The Consumer Faces Monopoly. (A study of the NRA.)

Public Works Planning and Economic Control.

Mr. MacIntyre: And I tender the witness as an economic expert.

Trial Examiner Norwood: He is received as such.

By Mr. MacIntyre:

Q. Dr. Loucks, what, in your opinion, is the proper meaning of the term "market" in economic theory?

A. I should say that the term "market" means a center or market place at which buyers and sellers are free to get together, negotiate with each other freely, where there is a good deal of information floating around about supply and demand, where there are various bids and offers made by buyers and sellers, there are various transactions informa-
tion about which is rather open to the various par-
6327 ticipants in the proceedings, and in general where
supply forces and demand forces meet, come together, converge, if you like.

Q. In order to constitute a true market, must all of the buyers and sellers be present in person?

A. No. There would be possibilities of carrying on negotiations by some form of communication, messenger or authorized agent, something of that sort.

Q. Is the term "market" used in any other sense than the sense in which you have defined it here?

A. It is used in a looser sense than I have defined it to refer to a somewhat broader thing. It is sometimes used to refer to a market area as the territory surrounding what I have called a market place or a market center. Such an area would be the territory from which buyers come to what I call the market center, or a true market from which sellers come to such a market center. It would be the area from which, I suppose we could say, demand and supply originate; that is, the demand and supply that converge upon a given market center.

Q. When economic theory uses the concept of a market in its analyses of price determination, does it make any assumption as to how many buyers or how many sellers must be operating in a given case in order to have a market existing?

A. No assumption as to precise number, as far as I know.

Trial Examiner Norwood: There is a minimum 6328 number there, isn't there, Doctor?

The Witness: For a true market to exist, there would be no assumption that the number could be less than several buyers at least. At least several.

By Mr. MacIntyre:

Q. Do you mean by that that a market could not exist in the economic sense of the term when only one buyer was operating?

A. A market could not exist in the economic sense of the term where there was only one buyer. That would be the use of an entirely different concept than the one I was referring to under the title "True Market."

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Q. You say, then, that to pick out some one buyer of rigid steel conduit and to say that that one buyer constituted a market for rigid steel conduit is to use the term in a different sense than it is properly used in the price analyses of economic theory?

A. Yes, I would agree to that. That would be using the term in a different sense.

Q. Why, in your opinion, does economic theory not accept such a concept of a market?

A. Well, for economic theory to accept as a market the location of a buyer would make the term largely meaning-

BLEED THROUGH – POOR COPY

less for the purposes of economic theory. It would
6329 make the concept "market" synonymous with "sale,"
I should say. A market, if it were used in that sense, would automatically be created whenever a sale took place, and as soon as the sale was over the market would automatically be destroyed, and it would become a term synonymous with "sale" and there would be no point in having such a concept, so far as economic theory is concerned.

Mr. Stewart: Mr. Examiner,—

A. (Continuing) It would rather—

Mr. Stewart: Excuse me.

A. (Continuing) It would rather reduce it to an absurdity, I should say.

Mr. Stewart: I am wondering if this form of question and answer, that is, this use of the term "economic theory" is not going to be an invitation to the same trouble we had yesterday. I take it what the witness is doing is giving us his opinion as an economist; he is not undertaking to speak for all economists. He is using the general phrase "economic theory." Now, does that mean everybody, or just his idea of it.

Trial Examiner Norwood: I think you can clarify that on the cross-examination if it is not done prior to that time. Go ahead.

By Mr. MacIntyre:

6330 Q. What do you mean by "reducing this term to an absurdity," as you have used that in your last answer?

A. I mean by that that it would have no significance; it would have no usefulness to economic theory. Economic theory only formulates and accepts and makes use of concepts that have some meaning relative to the purposes of economic theory, the purposes of economic theory being to explain what happens in our industrial system.

Q. Will you explain whether or not that when you use the term "economic theory" you mean your opinion of what the general body of economic literature holds, or just what do you mean?

A. Yes. I mean my understanding of what the general body of economic literature holds. As I have read that and studied it and taught it, I have tried to absorb certain agreed-upon concepts, agreed-upon principles, to which not every economist would adhere, but which might be thought of as quite commonly accepted in the field of economics.

Q. Would the law of uniform price as an economic principle have any significance if the term "market" were used, as I have suggested, to mean the location of one buyer?

A. No, it would have no significance at all.

Q. Why not?

A. Because if you used the term "market" to mean simply one buyer, the law would consequently become
6331 simply a truism that would be of no significance. It would be the equivalent of saying a price is a price, and the law of one price expressing a tendency for prices to become uniform would no longer have any significance because in that sense of the term "market" you could only by definition have one price in the market as the result of one sale, because whenever you had a sale you would have automatically a market.

Q. Well, using the term "market" as you have defined it, are separate markets related to each other?

A. Yes.

Q. How?

A. Separate markets are related to each other in the sense that the various market areas adjoin each other and the boundaries between those areas are obviously related to the various markets. Those boundaries may shift from time to time as conditions of supply or demand, or both, change in a given market. The boundaries of the market area tributary to that particular market center may shift in relation to the boundaries of other market areas adjoining it.

Q. Are you acquainted with the terms "surplus area" and "deficit area" and the correspondingly "surplus market" and "deficit market" terms?

A. Yes. Those are commonly used.

Q. What do they mean?

A. A surplus market area would be one in which
6332 the facilities for producing a commodity are so great relative to the demand in that particular area that the resulting surplus of output, or potential output, would drive the price of that commodity in that area down relatively low.

On the other hand, your deficit market area would be just the opposite of that. I should say where the productive capacity or facilities are so small in amount relative to demand that the price normally there would be relatively high.

BLEED THROUGH – POOR COPY

Q. Well, if such a condition existed as you have described, would you expect the commodity involved to flow from one market to another?

A. Under competitive conditions I think there would be such an assumption, yes.

Q. And would the flow be continuous?

A. Yes. The flow when it occurred would be the result of some sort of a price differential. The price in the surplus market area being relatively low, and the price in the deficit market area being relatively high, as soon as the differential exceeded the transportation cost relative to market the flow would take place from the surplus market area to the deficit market area, and that might be continuous at least as long as the differential was sufficient to cover transportation costs. The flow would be expected to continue under competitive conditions.

6333 Q. Why would it have to be equal to or above the cost of transportation?

A. Unless it was under competitive conditions no flow would take place. That is the only stimulus that buyers and sellers in those regions would have to create a flow.

Q. Are there any conditions under which you would expect that a commodity would flow from a normally deficit area to a normally surplus area?

A. Under competitive conditions if such a flow occurred it would have to be a very temporary, sporadic thing as a result of some very temporary price cutting of some sort. It could not be under competitive conditions in continuous practice because there would be no incentive, no stimulus which would create such a flow.

Q. Would you expect a continuous flow from a deficit area to a surplus area under effective competition?

A. No.

Q. Why not?

A. Because under effective competition the price in the deficit area would be relatively high and the price in the surplus area relatively low, and I would not expect goods to move continuously from a high price area to a low price area.

Q. Would you consider a market to be a deficit area as long as it possessed unused productive capacity to turn out the commodity in question?

6334 A. No, it would not be a deficit area as long as that situation prevailed.

Q. What is meant by the term "forestalling"?

A. "Forestalling" is a term that appears in economic history. It refers to certain practices in the early fairs, markets of the English villages. As I understand it, it refers to a procedure or practice whereby certain purchases of goods would be made while those goods were in effect on the way to the market place, buying them up by approaching the seller in—

Trial Examiner Norwood: I do not think we need to enlarge on that. We had it before, and it is not controversial at all what "forestalling" means.

By Mr. MacIntyre:

Q. Is there any counterpart in modern practice to that term "forestalling" as it was used originally in economic theory?

Mr. Stewart: Well, I presume this is being asked as an economic opinion, not as a fact.

Trial Examiner Norwood: That is right.

Mr. MacIntyre: That is true, yes.

A. Yes. In my opinion you could say that any isolated deal between a buyer and a seller is quite similar to the practice referred to by forestalling. By an isolated deal I would mean a purchase-sale transaction which was made away from what I have called a market center, where
6335 a buyer was approached by a seller, or the other way around, in an isolated location, and during the transaction there was no negotiating between the buyer and seller at a market center where there were other buyers and sellers.

By Mr. MacIntyre:

Q. What is meant by the term "dumping"?

A. In its broad meaning in economics dumping refers to a classification of sellers—pardon me—a classification of buyers. It refers to a seller classifying his buyers and then charging such prices to those buyers as results in a different net price to the seller from some buyers than the seller receives from other buyers.

Q. Is that practice of dumping ever used in competitive markets?

A. In a competitive market if dumping occurred it would be an unusual thing. It would be a very sporadic thing. Conceivably it could occur in an isolated instance in a

BLEED THROUGH – POOR COPY

single transaction, but not in any continuous sense, I should say.

Q. Now, with respect to the question of control over a market, what, if anything, would the evidence of dumping present to you as an economist?

A. Whenever dumping occurred as a regular practice it must mean that the seller who is dumping exercises a certain control over his market, over the territory within which he sells, or a certain portion of that territory.

6336 There must be some control over at least a portion of the market area.

Q. What is meant by the term "mutual dumping"?

A. Mutual dumping would occur where two or more sellers carry on the practice that I defined as dumping in such a way that one seller would be selling the product to some potential customers of the other seller at a lower net price than he is selling the product for to other buyers, and that would occur on the part of each seller. Each seller would do that with reference to potential customers of the other seller.

Q. In your opinion as an economist, what is the effect of the practice of dumping upon the level of the price in the home market, that is, the place of the production of the dumper?

A. In the portions of the area most advantageous to the dumper he would have to have a relatively high price in order to be able to dump elsewhere.

Q. Relatively high compared with what?

A. Well, I should say relatively high compared with what the price would be if no dumping occurred, and no dumping could occur only if some form of effective competition prevailed. In saying that, of course, I am assuming that the object of the dumping is to get for all the products sold a higher price than otherwise would be realized for all the products sold.

6337 Q. Are we to correctly understand that your answers as to the effect on the price level in those situations would apply both under simple as well as mutual dumping? That is, the effect on the price level in the dumper's market, the home market.

A. I was thinking particularly of mutual dumping when I made the answer.

Q. Well, take the case of simple dumping. What effect on the level of the price in the home market, or the

place near the production of the dumper,—what effect would it have on the price level there?

A. Well, it would have to stay up in order to have dumping carried on even sporadically, I suppose.

Q. That is, stay up with relation to what?

A. Well, with relation to what it would be if the same seller were selling at the uniform f. o. b. price to all sellers —to all buyers.

Q. If you were to assume a condition of mutual dumping, using that term as you have defined it, what would such a condition indicate to you as an economist as to the degree of the control over the market by those engaged in such mutual dumping?

A. Well, it would show that each dumper engaged in mutual dumping has some substantial control over his nearby customers.

6338 Q. Could such practice exist under competition?

A. No, I don't think so.

Q. In your opinion as an economist, is it correct usage to say that such a practice is resorted to in order to meet competition and is thereby a competitive practice?

A. Referring to mutual dumping, my answer would be no, it is not proper to so refer to it.

Q. What is your understanding of the term "elastic demand"?

A. An elastic demand for a product exists when, as a result of a change in price, the quantity of that product that will be taken by buyers changes substantially.

Q. In the same or different directions?

A. As the price increases the amount that buyers will take will substantially decrease. As the price decreases the amount that buyers would take would be increased substantially.

Q. What is your understanding of the term "inelastic demand"?

A. In the case of an inelastic demand, the amount that would be taken by buyers responds very slightly to changes in price; that is, as the price increases the amount that buyers will take may decrease, but not very much. As the price decreases the amount that buyers will be willing to take may increase, but not very much. It is a relative thing.

Q. What do you understand by the term "law of
6339 one price" or "law of uniform price" as that term is used in economic theory?

BLEED THROUGH – POOR COPY

A. Well, as usually stated, the law would be something like this: That for a given product in a given market at a given time under conditions of competition all the units sold tend to sell for the same price.

Q. According to economic theory, what forces would operate to create such tendency?

A. It would be due largely to the fact that, so far as the buyers are concerned, it makes no difference to them from what seller the product comes, if it is a homogeneous product, and that they would shop around seeking the lowest priced seller. So far as the seller is concerned, it makes no difference to him from whom the money comes Then he would look around to find the highest-priced buyer. As a result of the buyers during that and the sellers doing that at the same time there would be a tendency for the price to become the same for all units sold.

Q. Will you tell us whether or not that you mean by that that a seller will sell all of his goods to the buyer from whom he can get the highest price before attempting to sell at any other price?

A. No, I don't think so.

Mr. Robison: I think, Mr. Examiner, it should be made clear whether the question has reference to buying 6340 and selling in one market or in several markets.

Mr. MacIntyre: Well, I will withdraw the question. I will withdraw the question.

Trial Examiner Norwood: All right.

By Mr. MacIntyre:

Q. Does the law of uniform price refer to price quotations by sellers to prospective buyers?

A. No.

Q. Why do you say that?

A. Well, any economic law or principle dealing with price law, as the law of uniform prices does, refers to a real price, not to a quotation. A quotation would be considered merely an offer to sell at a given price. No real price exists, so far as economic theory is concerned, until a transaction has actually taken place.

Q. Is there any economic principle which refers to a tendency for price quotations by a number of sellers to be identical at any given destination?

A. No, none that I know of.

Q. On the basis of your knowledge of economic theory,

would you expect the law of uniform price to operate if the term "price quotation" were substituted for the word "price"?

A. No, I would not.

Q. Why not?

A. Because I would expect quotations to differ
6341 under conditions of competition, and it is under such conditions that the law of uniform price—it is to such conditions that the law of uniform price refers. Under conditions of competition I would expect that various sellers, possibly at the same time, would be offering various quotations.

Q. In referring to your definition of the term "law of uniform price," you use the term "tends" or "tendency". Is that a commonly accepted word?

A. Yes. That would be a common way of putting it, I think.

Q. Why is the word "tends" or "tendency" used in that connection?

A. If you refer to the law as operating under conditions of competition as I did, it would only be under conditions of perfect competition that there would be precise uniformity of price.

Q. Well, if price uniformity of actual prices did exist in some market, would you then assume that perfect competition existed in that market?

A. No. But there would be other conditions under which precise uniformity might exist other than perfect competition.

Q. What other conditions could account for such precise uniformity of prices?

A. If all the sellers were selling at some agreed-upon price and had the power to enforce that agreed-upon
6342 price, it is rather obvious that there would be precise uniformity of price. That would be a very tight or possibly a complete monopoly.

Q. Does the law of uniform price imply that no seller will ever try to expand his sales by offering to sell for a price below those of other sellers?

A. No.

Q. Does the law of one price imply that the price of a commodity in a given market will remain constant for any extended period of time?

A. No. The law of one price always refers to a given time.

BLEED THROUGH – POOR COPY

Q. Does the term "competition" have any standard meaning in economic theory?

A. It has only in a very broad sense. In its broadest sense it refers to rivalry, I suppose rivalry among buyers and rivalry among sellers.

Q. Well, is there any narrower sense in which the term "competition" is used?

A. Yes. The term "competition" is modified usually, I would say, to refer to various specific conditions.

Q. Why, in your opinion, have various qualified concepts of competition been developed in the literature of economic theory to describe particular conditions?

A. Those qualifications have been added because economists have always recognized various degrees of
6343 competition, various degrees of competition resulting from various practices that would create various degrees of competition.

Q. Is the word "competition" used without qualification in economic literature to refer to the entire range of the degrees of competition?

A. No. It is qualified when it refers to varying degrees.

Q. Could you illustrate that?

A. Yes. You could take some term such as "perfect competition". The word "competition" qualified by the adjective "perfect" that would mean in economic theory a situation where there are a great many buyers, a great many sellers, operating at the same market center, where every buyer and every seller has complete information concerning all aspects of supply and all aspects of demand, where each of them is operating solely in his own interest and independently, where there is no uncertainty as far as the future is concerned, where there is, in fact, no friction, where there are no obstacles to new concerns coming into this particular market to sell and there are no obstacles to concerns that are now there leaving. All those conditions would be summed up under the term "perfect competition".

Q. Well, does economic theory analyze in considerable detail the matter of competition and give any specifications as to the state or kind that exists under particular conditions?

A. Yes. Economic theory analyzes in great detail
6344 competition, various kinds of competition, and tries to relate those various kinds to some realistic description of what happens in the business world.

Q. Well, what kind of competition does economic theory assume will perform the function of competition in the actual business world?

A. I should answer that, I think, by referring to the function that is assumed first, and then discussing the kind of competition that would render that function. As long as we retain the type of economic society we have, economists assume that it is the function of competition to act as a regulator of prices and to act as the force which weeds out, destroys, the various inefficiencies that may exist in the system, and I think you could go beyond that and say that economists assume that it does not require perfect competition to do this because they assume that perfect competition never exists in the business world, but that some form of competition less than perfect but approaching perfect must be relied upon to adequately perform the function I have described.

Q. Well, what kind do economists assume will perform such a function?

A. I think you could call it effective competition as a very accurate description of what they had in mind.

Q. Will you define that term "effective competition" for us as you have used it?

6345 A. As I have used it effective competition would exist when, discussing it now from the seller's side as we usually do, a number of sellers are offering to sell in a given market and when they are acting in such a way in the determination of their policies as to production and price that buyers that seek to buy from those sellers have real alternatives in making their purchases, have alternatives which enable buyers when they exercise those alternatives to bring to bear considerable pressure upon price and quality and conditions of sales in general.

Q. Well, will you explain somewhat more in detail what you mean by "alternatives" and to what they refer?

A. Well, these alternatives would refer, first and foremost to price.

Q. Well, would you say that these alternatives, as you have used the term, are present each time a buyer seeks quotations from a number of sellers of a homogeneous product, he always meets precisely the same price quotations from all quoting sellers, regardless of their freight advantages?

The Witness: What was the question? I am sorry.

BLEED THROUGH – POOR COPY

Trial Examiner Norwood: Read it.

(Question read.)

A. No,—

Mr. Robison: Just one moment, please.

There again, Mr. Examiner, I think we should know
6346 whether the question has reference to something to be expected in a single market or in several markets.

Trial Examiner Norwood: That fact can be clarified later.

Objection overruled.

A. No. I would say the alternatives that I have been referring to do not exist.

By Mr. MacIntyre:

Q. Would your answer be the same if all the destination price quotations were identical but the terms of sale and delivery varied somewhat among the various quotations?

A. Yes, my answer would be the same.

Q. Why do you say that?

A. Approaching it as an economist, the emphasis I would put would be upon price as a somewhat more important thing by and large than the matters of quality, matters of delivery, and so on.

Q. Do you mean by that that in economic literature variations in quality and terms of sale and delivery are matters of no importance in bargaining between buyers and sellers?

A. No, I would not mean that. In any specific case, matters of quality or matters of service might be highly important. I was rather talking in general terms, saying that by and large as the economist develops price theory
he works on the assumption that price is of foremost
6347 importance and that these other matters are of lesser importance.

Q. Are you familiar with the terms "monopolistic" competition and "imperfect competition," as they are used in economic literature?

A. Yes, I am, in general.

Q. Are these terms used synonymously in economic literature, or are they used to refer to quite different terms—quite different forms of competition?

6348 A. The terms are not used consistently in the field of economic theory.

By Mr. MacIntyre:

Q. To what kinds of competition—

Mr. Stewart: I move to strike out the answer as not being responsive. That was not the question.

The Witness: I am sorry. I had not completed my answer.

Mr. Stewart: The question was "quite different" and the answer was "not used consistently."

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Finish your answer, Doctor.

A. (Continuing.) In general, I would say that they are taken to mean about the same thing, although that is not consistently true throughout economic literature.

By Mr. MacIntyre:

Q. To what kinds of competition do they refer?

A. Well, they are terms referring to a very wide
6349 variety of both degrees and kinds of competition.

Q. Well, can you be somewhat more explicit in stating kinds in that answer?

A. Yes. I think that included in the meaning of those terms would be degrees and kinds of competition ranging all the way from some forms of competition that approach perfection but fail to reach it to, on the other hand, some forms and degrees of competition that have in them so little competition that they approach very complete monopoly.

Q. Do we correctly understand your testimony, then, to mean that, in your opinion as an economist, they include a state of imperfect competition that would involve control brought about by human arrangements?

Mr. Stewart: I object to that on the grounds it is leading. The question has been answered twice. The Doctor has made quite plain what he means. Now, evidently Mr. MacIntyre wants some more and now he proposes to lead him, "Do we understand by your testimony—" That is not proper for him to ask.

Trial Examiner Norwood: Objection sustained.

By Mr. MacIntyre:

Q. When economic theory analyzes the operation of supply and demand forces, in what terms is this analysis constructive?

Mr. Stewart: What is that, please?

(Question read.)

6350 Mr. Gilpatric: I object to the question because I cannot understand it.

Mr. MacIntyre: It was "constructed" instead of "constructive."

Mr. Stewart: Well, even then I suggest that the question is meaningless.

Mr. MacIntyre: Well, let us see if it means anything to the witness.

Mr. Stewart: Well, but we have a right—

Trial Examiner Norwood: Do you understand that, Doctor?

The Witness: Yes, I think so.

Trial Examiner Norwood: Objection overruled.

Answer.

A. It is constructed in terms of price. As I said a while ago, I think price is considered the most important phenomenons in the picture.

By Mr. MacIntyre:

Q. Do you have any further thought that you can express to us as to why that is true?

A. Well, it is true because economic theory attempts to be realistic. I think to attempt to describe business industrial phenomena in terms that do not make price the center of your explanation would be somewhat unrealistic.

Q. What does the term "price competition" mean
6351 to you as an economist?

A. Well, it means that in a given market at a given time sellers will be quite free to and, in fact, at times will actually be offering a homogeneous commodity at various quotations.

Q. Would you consider the making of different offers as to quality of product and term of sale and delivery, the price being the same from all sellers, to be the same thing as price competition?

A. No, I would not.

Q. What would you say is the relation between price competition and effective competition, as you have been using these terms?

A. I would say that price competition is the most essential ingredient of effective competition as I have used the term.

Q. Dr. Loucks, I am going to ask you a number of questions which will be based upon a hypothesis, and which I will designate as hypothesis No. 1.

I hand you a statement of that hypothesis, and ask you if you are acquainted with it, and if you have read it.

Trial Examiner Norwood: Is this the one that already appears in the record?

Mr. MacIntyre: It is the statement—I will state for the record that it is the statement of assumptions placed in the record as hypothesis No. 1 beginning on page 5979 6352 and running through to and including 5983.

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Trial Examiner Norwood: Go ahead.

Mr. Gilpatric: In order that the record may be clear, may it be understood that our objection made to the hypothesis when it was first presented will apply to the resubmission of it here?

Trial Examiner Norwood: Yes. Same objection and same ruling.

6353 By Mr. MacIntyre:

Q. Now, Dr. Loucks, calling your attention again to the assumptions outlined in hypothesis No. 1, I will ask you to state whether or not that you recognize in that set of assumptions a description of a method of quoting prices with which you are familiar.

A. Yes.

Q. What is that method?

A. It is often referred to as the basing-point method.

Q. Are the conditions outlined in that hypothetical set of conditions consistent with the existence of any form of competition with which economic literature deals?

A. Yes; some very imperfect form of competition, I should say.

Q. Could price competition exist under these hypo-
6354 thetical conditions?

A. No, I do not think so.

Q. Could effective competition, as you have defined that term heretofore, exist under these hypothetical conditions?

A. No.

Q. Where is the market under these conditions outlined in this hypothesis No. 1?

A. Well, there is no true market, as I have been using that term, under those conditions.

Q. Could monopolistic or imperfect competition exist

BLEED THROUGH – POOR COPY

under these hypothetical conditions outlined in hypothesis No. 1?

A. Yes. As I have used the terms "monopolistic" or "imperfect competition," they could exist.

Q. Why do you say that monopolistic competition could exist but that effective competition could not exist under these conditions outlined in hypothesis No. 1?

A. As I have used "effective competition," it is a narrower term than the terms "monopolistic" and "imperfect competition." It refers to a type of competition which is nearer to perfect competition than would be some forms of imperfect or monopolistic competition. That is as I have used the term "effective competition" it requires that there exist certain alternatives for buyers which might not exist under certain forms of imperfect and monopolistic competition.

Q. What alternatives are you referring to in that instance?

6355 A. Well, one, for instance, would be the alternative that the buyer would not have in this case of buying his product free of any transportation service.

Q. Are there any other alternatives which the buyer lacks or does not have under this hypothesis No. 1?

A. Yes. Apparently he has no alternatives as to the type of transportation service that will be used to convey this product to any location at which he wants it, nor does he have in all cases the alternative of having the product transported from the place where it is actually produced to his location. That is, so far as pricing is concerned he lacks that alternative.

Q. Why do you say that the buyer lacks the alternative in so far as pricing is concerned?

A. Well, because in the price that he is quoted there will be a transportation charge which may not be the actual transportation cost from the place where the commodity is produced and shipped to him.

Q. Well, would the absence of this last alternative about which you have been speaking affect price competition?

A. Yes, just the same as the other alternatives if they are absent will affect price competition. It would decrease the amount of price competition.

Mr. MacIntyre: What is the last part of the answer?

(Last part of answer read.)

6356 By Mr. MacIntyre:

Q. How would it do that?

A. Well, as I have said it would remove from buyers certain alternatives which are absolutely essential to the existence of price competition. It would remove all possibility, so far as I can see, that the buyer would have any opportunity to shop around to find anybody who is offering a different price quotation. No seller, if the formula is used, would be offering or would have any incentive or ability to offer any different quotation. The buyer knowing that would know that he lacks any incentive to shop around to get a better offer.

Q. Will you tell us whether or not, in your opinion as an economist, the absence of this alternative would constitute substantial interference with effective competition upon the producer?

A. Yes, it would.

Q. Is there any other important alternative the buyer would sacrifice under the operation of this pricing formula outlined in hypothesis No. 1 which you can recall in addition to those you named?

A. I think it would be pretty well summed up in saying that he lacks all those alternatives that would exist under effective competition in the form of various quotations from various sellers, and, lacking those, he would lack any incentive to shop around to find them.

6357 Q. Could you tell us whether or not, in your opinion as an economist, that such limitations and restrictions would constitute a substantial restriction upon the effectiveness of competition?

A. Yes, they would.

Q. When you speak of alternatives that are open to the buyer, do you place any significance upon the number of sellers who are quoting prices to prospective buyers?

A.. No. I don't think that is a matter of importance.

Q. Well, would you be willing to say that the more sellers there are who quote prices the more alternatives the buyer has open to him?

A. No. That would depend entirely upon what those sellers were doing. If there were twenty sellers, and if every one offered the same price, I should say that he has no more alternative than if there is just one seller quoting a price.

Q. Well, as you understand the basing-point method and

BLEED THROUGH = POOR COPY

system of quoting prices as outlined to you in hypothesis No. 1, does it involve a mutual dumping, as you have used that term?

A. I think that that is inherent in the operation of that formula or method of pricing, yes.

Q. Assume that while the basing-point practice was in force in the rigid steel conduit industry in accordance
6358 with the assumptions in hypothesis No. 1; that the demand at Philadelphia decreased and the demand at Washington increased, while quotations and prices remained unchanged, what is your opinion as an economist of any claim that each of these two destinations is a separate market?

A. I would see no claim—no basis for such claim.

Q. On the same assumptions, what is your opinion as an economist of any claim that the quotations and prices under the basing-point practice are determined independently at each destination by the forces of demand and supply focussing at each destination; that is, at each so-called market?

A. I would see no basis for that claim.

Q. On the same assumption, what is your opinion as an economist of the consistency of the above-mentioned claim with any further claim that the only way the various local demands and changes in them affect quotations and prices is that all the demands in the Pittsburgh area are thrown into a hopper in order to determine the base price at Pittsburgh?

A. That last claim seems to me to be quite meaningless. I don't know what is meant by throwing things into a hopper.

6359 Q. On the same assumptions, that is, about this supply and demand at Philadelphia and Washington, what is your opinion as an economist of the way the various local demands are related to each other?

A. If they are related at all it must be through the operation of the basing-point formula. That is the only way they could be, so far as I can see.

Q. Are the various destination prices under those assumptions related in any other way than through the base price and the basing-point formula?

Mr. Gilpatric: Didn't we just have the answer to
6360 that? Isn't that unnecessary?

I object to the question as duplicating the record.

Trial Examiner Norwood: Read the previous question and answer.

(Question and answer read.)

Trial Examiner Norwood: Objection sustained.

By Mr. MacIntyre:

Q. Assume that the base price which is used in the operation of the method which is outlined in hypothesis No. 1 is higher than the average of the mill nets which are received by the sellers operating under the system, what, in your opinion—strike that—what can you as an economist say as to the justification for the level of the base price?

Mr. Stewart: Now, may we have the question as revised?

Trial Examiner Norwood: Read the question as amended.

(Question read as follows:

"Q. Assume that the base price which is used in the operation of the method which is outlined in hypothesis No. 1 is higher than the average of the mill nets which are received by the sellers operating under the system, what can you as an economist say as to the justification for the level of the base price?")

6361 Mr. Gilpatric: I object to that question, Your Honor, because there is no evidence of any kind in this record that the average mill net is lower than the base price.

Trial Examiner Norwood: I think there is some evidence of that.

Mr. Gilpatric: I think there is no evidence as to what the average mill nets are. There is no testimony on that.

Mr. MacIntyre: I am amazed.

Mr. Gilpatric: Just state where it is, then.

Mr. MacIntyre: The testimony of all the witnesses who have been put on here have testified that they do not make all of their sales at the base price, but that they do engage in freight absorption and take mill nets below it.

Mr. Stewart: That is quite contrary to the fact, because certainly the seven mills at Pittsburgh don't do that. They sell f. o. b. Its silly.

Trial Examiner Norwood: I think the point is well taken which the Respondents make there as to any definite evidence as to averages, but I think the counsel can base his question on a substantial number of sales, or something

like that. If it were to be taken literally, I am not sure that there is any evidence as to average.

Mr. Gilpatric: Mr. Examiner, I would like to add to my objection, furthermore, that this is bringing in a new
6362 issue that was not raised in the Respondents' case at all. I do not think it is proper rebuttal. We had no question about average mill nets being above or below base prices.

Mr. MacIntyre: If Your Honor please, I will cite you some testimony on that. Mr. Morrow, called by Mr. McDaniel as a witness for the Respondents, testified in New York that 9 percent of his sales were made in the Chicago basing territory and shipped from Pittsburgh.

Trial Examiner Norwood: I shall sustain the objection to the question in its present form and ask the counsel to amend the assumption there and he will bring out the point.

Mr. MacIntyre: Amend it to fit what?

Trial Examiner Norwood: Instead of average, you base it on whatever you consider the record shows as to substantial numbers of the sales being made below the mill net.

Mr. MacIntyre: Well, if Your Honor please, if any sales are made below, then the average of all the sales would have to be below the base price, because any one of them would bring the average below the base price. That is my contention. I am not saying where the average falls, but I am saying that if any one of them were below the base price, it would bring the average below, and Mr. Morrow testified that 9 percent of his were below.

Trial Examiner Norwood: I think the counsel is
6363 right about that.

Mr. Robison: Well, Mr. Examiner—

Mr. MacIntyre: I don't have to say where the average falls.

Trial Examiner Norwood: I beg the counsel's pardon. I had overlooked that.

Mr. Robison: Mr. Examiner, I think something further is being overlooked. This hypothesis No. 1 makes reference to what Mr. MacIntyre has chosen to designate as phantom freight. There has also been reference in this record to absorption of freight, but there is not one word in this record anywhere from which anybody can determine whether absorption of freight exceeds or is less than the aggregate amount of so-called phantom freight.

Mr. MacIntyre: That has no application to the pending question, if Your Honor please. We are talking about another matter now.

Trial Examiner Norwood: Read the question. Read the question.

I shall overrule the objection and ask the witness to answer the question.

Do you wish it read?

The Witness: Yes, please.

(Question read.)

Trial Examiner Norwood: Answer the question.

6364 A. Under those conditions it would appear to me that there was some element in the base price that the seller was not getting. It must go to somebody else.

6366 By Mr. MacIntyre:

Q. Is there any economic principle with which you are familiar which justifies sellers in a competitive market setting price quotations at such level so as to compel buyers to pay a higher cost for merchandise purchased by them than the price which is finally received by the buyer?

6367 A. That would not be a competitive behavior within the concept of effective competition that I have described.

Mr. Stewart: Well, I move to strike out the answer on the ground that it is not responsive. That is not the question. The question is, "Is there anything in economic literature"—

6368 Trial Examiner Norwood: Yes, I think the Doctor may answer that more directly.

Mr. Stewart: Just "yes" or "no." That is—

Trial Examiner Norwood: Is that covered by the literature in such cases?

Mr. Stewart: I mean the answer is "yes" or "no," is there anything in economic literature—that calls for a "yes" or "no" answer.

A. There is nothing in economic literature, so far as I know, which deals with a situation in which a buyer—pardon me—a seller asks for and gets—pardon me. I will have to start that over again.

There is nothing in economic literature, so far as I know, which deals with a situation in which a seller asks for and gets some price a part of which he does not receive as his net price.

FILED THROUGH - POOR COPY

By Mr. MacIntyre:

Q. Well, now, going back to my assumptions as to the level of the base price quoted and as to the level of the average of the mill nets received, in your opinion as an economist, is that a competitive situation?

Mr. Stewart: May I have that question again, please?

Trial Examiner Norwood: Read it.

(Question read.)

6369 Mr. Stewart: Is what? You mean the fact that those two things exist?

Mr. MacIntyre: Oh, no. I have given him a set of assumptions.

Trial Examiner Norwood: Is that a competitive situation where the average mill net is lower than the mill base price

Mr. MacIntyre: Lower than the base price.

Trial Examiner Norwood: Yes.

Mr. Robison: I again press the objection which was made before, that there is no evidence in the record to support the assumptions in the question.

Trial Examiner Norwood: Objection overruled.

Answer the question, Doctor.

A. Well, that situation is not within the limits of what I have called effective competition.

Mr. Stewart: Now, what was the question?

Trial Examiner Norwood: Read it.

(Question re-read.)

Mr. Stewart: All right.

By Mr. MacIntyre:

Q. Are you familiar with the term "rigidity of price"?

A. Yes.

Q. To what does it refer?

A. Price is usually referred to as rigid if it re-
6370 mains constant for some extended period of time.

Q. Is it customary to use the term "flexible price" as the opposite of "rigid price"?

A. Yes.

Q. Would you expect, then, an industry featured by effective competition to possess rigidity or flexibility of prices?

A. I should say flexibility.

Q. Why?

A. For a number of reasons. Flexibility would come

about through, under conditions of effective competition, different price quotations being offered from time to time; changes in supply and demand conditions occurring presumably quite often, under conditions of effective competition would have to work through to changes in price quotations which would affect actual market prices frequently.

Q. Do prices have to be flexible in order to keep them closely related to the costs of production?

A. Yes, they have to be reasonably flexible because it is only through changes in price that price can be pulled toward cost of production.

Q. I will ask you to assume that it appears in evidence in this case that at a certain time there occurred a decrease in the total demand for conduit at the delivered price quotations then followed by all manufacturers of rigid steel conduit throughout the country, so that 6371 there was a considerable increase in the idle or unused capacity for production, but that nevertheless the base price factor in the quotations was at that time substantially increased thereby increasing the destination cost of the product in all parts of the country. Would this behavior of prices indicate to you as an economist that the price of rigid steel conduit was acted upon or responsive to the forces of demand and supply as you would expect it to behave in a normal or approximately normal competitive market?

Mr. Stewart: I object on the ground that there is no evidence to justify the assumptions, first. In the second place, that there is no definition of the meaning of the term "substantial," and, as used in this question, it is very important as to what is meant by "substantial."

Mr. MacIntyre: I contend that there is evidence in this record in that direction, and that the Respondents put it in.

Trial Examiner Norwood: Read the question.

Mr. MacIntyre: At least a large part of it.

(Question read.)

Mr. Stewart: I would also like to add to the objection that there is no evidence of considerable increase in idle capacity.

Trial Examiner Norwood: Is that a sufficient statement of conditions to enable you to make an answer, Doctor?

BLEED THROUGH – POOR COPY

6372 The Witness: Yes, I think so.

Trial Examiner Norwood: Objection overruled.

A. My answer would be that those conditions cited do not indicate a response to changing conditions in demand and supply as that response would be expected under conditions of effective competition.

Trial Examiner Norwood: Well, would other factors coming in there change the situation?

The Witness: I don't see any. I could go over again the factors I understand there and check them over, if you like.

Trial Examiner Norwood: Never mind. Go ahead.

By Mr. MacIntyre:

Q. Does economic theory devote any considerable attention to the relationship between prices and the costs of production?

A. Yes, it deals with that quite extensively.

Q. Could you summarize this relationship as economic theory pictures it?

A. Yes. Economic theory pictures price as having a very close relationship to cost of production under conditions of effective competition.

Q. Well, does this mean that a commodity sold under conditions of effective competition will sell for precisely its cost of production?

6373 A. No, it does not mean that.

Q. Why do you say that under conditions of effective competition this tendency will exist but not will not be precise?

A. There would be no possibility of having price be precisely at cost of production except under conditions of perfect competition. Under conditions of effective competition there would be enough variation in the production policies of the concerns in the industry I should assume, there would be enough possibilities of new concerns entering the industry and selling on the market to exercise a substantial pull upon price downward if price for any period of time remained substantially above cost. On the other hand, if price went below cost, remained there for any period of time, the ability of firms to leave the industry, the ability of firms to adjust their production policy so as to turn out less of the product, I should assume would so change conditions of production as to bring price back up toward cost.

Q. When you use the term "cost of production" in the way that you have been using it, what do you mean by it, as to what it includes?

A. The cost of all the essential ingredients in the product, raw materials, the power, the labor that went into its fabrication, its manufacture.

Q. Would you include in the cost of producing a manufactured product the cost of transporting the fab-
6374 ricated product from the mill or the factory where the last step in its fabrication takes place to the location of the buyer or the place where the buyer desires to use it?

A. I believe I will have to have the question read.

Trial Examiner Norwood: Read it.

(Question read.)

A. No.

Q. Why not?

A. Because when its fabrication is completed presumably buyers would be interested in it in that particular form and would be seeking to acquire ownership of it in that form. There would be nothing in addition that would have to be done in order to interest buyers in its acquisition.

Q. Is the freight charged for the shipping of steel pipe from the steel works to the conduit factory a part of the cost of producing conduit in the economic sense?

A. Yes, that is a part of the past cost. It is something that has been incurred up to—rather, prior to the time of completion of the fabrication.

Q. Assume that the carrier who transports rigid steel conduit from the place where its fabrication is completed to the place where the buyer desires to use it is a common carrier not owned by the rigid steel conduit manufacturer. Is the economic service of transporting the finished prod-
uct from the factory to the buyer's destination as
6375 performed any part of the operations of the conduit manufacturers?

A. No, I should say not. That is obvious.

6376 Q. Well, under that set of assumptions, is the freight charged to the destination any part of the price of the conduit?

A. Well, not as the economist uses the term "price," no. It is a combined price. You have the prices of
6377 two entirely separate things, and if you put them to-

BLEED THROUGH – POOR COPY

gether, add them together, they result as a combined price of conduit and freight.

Q. In your opinion as an economist, what is the price of conduit in the economic sense, under those assumptions?

Mr. Stewart: Well, I object, unless it gives the complete picture, for the reason that this record shows that conduit is sold principally to contractors who again use it. Now, if that is in the picture, well, then, all right, but it seems to me that this is just half the picture that is being given to the witness. This does not help us any.

Trial Examiner Norwood: Objection overruled.

The Witness: Is there a question?

Trial Examiner Norwood: Yes. Do you want it read?

The Witness: Please.

(Question read.)

A. It is the price of conduit when its fabrication or manufacture is completed, that is, when some buyer is interested in acquiring it.

Trial Examiner Norwood: Does that answer the question?

Read it again.

(Question re-read.)

Trial Examiner Norwood: Could you clarify that for us, Doctor?

6378 The Witness: Would you read my answer, please?

Trial Examiner Norwood: Read it.

(Answer read.)

The Witness: I would have nothing to add to that, I think.

Trial Examiner Norwood: You mean the price is what he pays for it?

The Witness: Yes, when its fabrication is completed.

By Mr. MacIntyre:

Q. If in the case of a commodity such as rigid steel conduit a price quotation contained a charge for transportation of that conduit from the fabricator or from a basing point to the buyer, would you as an economist consider that to be a quotation of the price of conduit, in the economic sense of the term?

Mr. Stewart: May I have that question?

Trial Examiner Norwood: Read it.

(Question read.)

Trial Examiner Norwood: Answer, Doctor.

A. No, that is not a price of conduit. That is the price of some conduit plus some transportation. It is a combined price.

By Mr. MacIntyre:

Q. When the economist uses the term "price" 6379 does he ever mean a mere price quotation by a seller or an offering price by a buyer?

A. No. He means the result of such actual purchase-sales transaction.

Q. When the economist analyses the operation of supply and demand forces as determinance of price, does he always deal in prices which are assumed to result from actual sales transactions?

A. Yes, that is the price that he is seeking to explain in his price theory.

Q. Can a price, in the economic sense of the term, exist under conditions of complete or almost complete monopoly?

A. Yes, if a purchase-sale transaction takes place.

Q. Does the mere existence of a price, in the true economic sense, indicate the degree of competition or monopoly that has characterized the transaction out of which that price has arisen?

Mr. Gilpatric: May I have the question read?

Mr. Stewart: Well, I am going to object on the ground that we have had a sufficient amount on the subject of price. I think we have gone over it from every conceivable angle, and it does not help us any to keep on going into these various phases of price. There is nothing disputed.

Trial Examiner Norwood: I would like to hear from the other counsel.

6380 Mr. Gilpatric: I would like to have the question read, Mr. Examiner. I don't recall the first part of it.

Trial Examiner Norwood: Read it.

(Question read.)

Trial Examiner Norwood: Objection overruled.

A. No. The mere existence of a price gives no indication of the degree of competition or monopoly.

BLEED THROUGH = POOR COPY

By Mr. MacIntyre:

Q. Now, with reference to the conditions outlined in hypothesis No. 1, in your opinion is the basing-point system described there one that might fairly be called a natural method of competition?

Mr. Stewart: I object to that on the ground that it is not a question of whether it is natural or not. We have had no definition of what is natural.

Mr. Gilpatric: And, adding to that, Your Honor sustained objections to our questions which had to do with what was natural and what was not natural, and there has been no definition of what this witness' conception of natural is.

Trial Examiner Norwood: I think in the case of the other witness we had the term defined and then I permitted him to answer.

Mr. Stewart: Let him say what he means by "natural."

Trial Examiner Norwood: It is such a thing as 6381 can be easily clarified by cross-examination, and that is what the cross-examination is for.

Mr. MacIntyre: Oh, they have used it in any number of questions that they put to their witnesses, the words "natural," "logical," "normal." If they used it without definition, as they did, and were satisfied with it, then I think that—

Trial Examiner Norwood: I think that he may answer this and counsel may clarify it. I am not sure just what we did before, but I think we followed the same method.

Objection overruled.

The Witness: You better read the question again, I guess.

Trial Examiner Norwood: Read it.

(Question read.)

Mr. MacIntyre: Now, I will insert the word "properly" instead of "fairly" in that question.

Mr. Stewart: Well, then, I object on the ground that there is no indication as to who is to determine what is proper or improper.

Trial Examiner Norwood: Objection overruled.

Answer.

Mr. Bozeman: Your Honor, before the answer is made I would like to voice an objection also, that it seems to me that this question calls for too broad a conclusion.

6382 Trial Examiner Norwood: Proceed. Objection overruled.

Please answer the question.

A. I do not see any way in which the—this basing-point system might be said to arise out of any natural forces.

Q. In what sense of the word is it, in your opinion, that the basing-point system as described in hypothesis 6383 No. 1 is unnatural?

Mr. Gilpatric: I object to that.

Mr. Stewart: He has not said it was unnatural. There is nothing in economics about nature.

Mr. MacIntyre: The Respondents are certainly waking up late to find out that there is nothing natural about the basing-point system. They certainly thought so for two weeks when they were putting on economic witnesses.

Trial Examiner Norwood: Read the question.

Mr. Gilpatric: My witnesses did not say that.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: I think that is permissible to meet an inference there.

Objection overruled.

A. I suppose that any satisfactory answer to that question requires some little discussion of the use of the word "natural" in the field of economics, and I would be glad to go into that, if I may.

Trial Examiner Norwood: Go ahead.

A. (Continuing) The economist always steers clear of the word "natural," largely because he does not know what it means. He insists upon assigning some definition to it before he uses it.

There are two ways in which the word can be used, 6384 I should think.

One would be as the product of certain impersonal forces, forces with the existence of which no person has any connection at all, some result which springs spontaneously from the operation of forces beyond the control of any person.

Now, if the word "natural" means that, then this basing-point system obviously has nothing to do with it. It has nothing to do with basing-point system.

If you mean by the word "natural" some result or consequence of some action or actions which certain individuals, persons, individually or corporately, may take in their own

FILED THROUGH - POOR COPY

interest in a given situation, then the basing-point system may be a response in terms of personal action, a system set up by personal action and decision. It may be the response to some given situation.

By Mr. MacIntyre:

Q. By a person or persons, is that what you mean?

A. In the second sense, yes.

Mr. Austin: And therefore natural in the second sense.

The Witness: Natural in the second sense.

By Mr. MacIntyre:

Q. In your opinion, is it or is it not natural for producers to complete or to profess to compete by mutually matching each other's delivered price quotations with
6385 identical quotations derived by formula from the elements of an assumed common base price and assumed common cost of transportation?

Mr. Gilpatric: I ask, in view of the witness' previous answer, that Mr. MacIntyre specify in which sense he used the word "natural."

Mr. Stewart: And if he is attempting to rebut some testimony that was given by the witnesses for the Respondents, that he tell us in what sense that he thought the witnesses used the word "natural"; otherwise we get exactly nowhere.

Trial Examiner Norwood: Read the question.

(Question read.)

By Mr. MacIntyre:

Q. I ask that you answer that in the light of the definition of "natural," as one of actions on the part of human beings.

Trial Examiner Norwood: As ordinary economic reactions, is that what you mean, or independent of economic reactions?

Mr. MacIntyre: Well, the witness has stated two senses in which he could use the word "natural." Now, I am asking him whether or not that this is natural in the second sense that he gave us.

Mr. Stewart: Human beings sense.

Mr. MacIntyre: Yes, from an economic viewpoint.

Trial Examiner Norwood: All right, answer the
6386 question.

A. Well, this may be a natural reaction in the second sense to a given situation. The given situation may

include a very strong pressure or desire, or circumstances making it possible to establish some limitations upon effective competition.

By Mr. MacIntyre:

Q. Would you as an economist consider that it is an act of competition for producers to compete or profess to compete by mutually matching each other's delivered price quotations with identical quotations derived by a formula from the elements of an assumed common base price and assumed common cost of transportation?

A. My answer to that would be the same, I think. It is not natural at all in the sense in which I used the term in the first place. It is not the necessary, inevitable result of impersonal forces at work. It would only be natural—and this would be the only sense in which the word "natural" could be applied to, in my opinion—if it meant a reaction from a given set of situations in which persons try to do a certain thing and use this particular method to accomplish that particular thing.

Trial Examiner Norwood: Recess till 1:30.

(Whereupon, at 12:15 o'clock p. m., a recess was taken until 1:30 o'clock p. m. of the same day.)

6387 Afternoon Session.

1:30 P. M.

Trial Examiner Norwood: Proceed.

WILLIAM N. LOUCKS resumed the stand and testified further as follows:

Mr. MacIntyre: Will you read the last question and answer, please.

(Question and answer read.)

Direct Examination by Mr. MacIntyre (Continued.)

Q. Will you answer that part of the question that deals with the point as to whether or not that is an act of competition?

A. Why, no, that is not an act of competition, as I have defined effective competition.

Q. Are there any ways in which the basing-point system as outlined in hypotheses No. 1 is, in your opinion, unnatu-

BLEED THROUGH – POOR COPY

ral or artificial by reason of the geographical pattern of prices it creates?

A. Well, yes, it is artificial in the sense that the method of pricing and the results thereunder do not correspond to the pattern that I should think would follow the existence of effective competition. There are a number of elements of artificiality. If you look at the consequences, for instance, the pattern of prices that would come about
6388 under the basing-point system would be quite artificial in the sense they would not correspond to the pattern of prices that you would get under an effectively competitive situation.

Q. If sellers seek to rival each other in stressing particular qualities of their respective products, in assuring prospective customers of the uniformity and dependability and the quality of their products, in emphasizing punctuality in the delivery, and other services, even though the sellers are quoting the same price, is that, in your opinion, price competition?

A. No, that is not.

Q. Is it a part of economic principles that a seller will sell a part of his output, that is, the commodity he has for sale, in a home market at a price higher than he sells a portion of it at some distant place and at the same time permitting others to come in and take sales in his home market which he could have taken by lowering his price?

A. No, there is no economic principle that would lead to the expectation that those conditions would exist under effective competition.

Q. If a manufacturing company employs traveling salesmen, or what they allege to be traveling salesmen, would you as an economist consider that they are operating in a competitive market when they go out from the point of production to places throughout the country and carry
6389 with them price quotations from which they are not permitted to deviate or enter into any bargaining with buyers over price?

A. No. I should think that restriction would be a restriction upon competition.

Q. From an economic standpoint, can a true market be said to be existing when negotiations on the part of sellers are handled by people alleged to be salesmen acting under instructions in the manner that I have outlined in the previous question?

The Witness: I failed to get the first part of the question. Would you read it, please?

Mr. MacIntyre: Read the question.

(Question read.)

A. No, their negotiations with buyers would not constitute a true market.

By Mr. MacIntyre:

Q. I am calling your attention to a set of assumptions appearing in the record beginning at page 4901 and extending to and including part of page 4913, and which has been referred to in this record many times as the statement of facts in hypothetical question A.

I will ask you, first, if you are acquainted with that statement, if you have read it.

A. Yes, I have read this.

Q. Keeping in mind that set of assumptions of fact
6390 set forth in hypothetical question A to which I have just called your attention, I will ask you this question: In your opinion as an economist, on the facts thus assumed in that statement, could such a marketing plan logically develop and continue to exist in an industry where competition prevails?

A. No, not in an industry where effective competition prevails.

Q. I will ask you another question on another set of assumptions.

Assume a manufacturing industry in which the product would be homogeneous, or standardized; that there are several manufacturers or producers, and that some of them at least have a volume of production of considerable size and distribute their products to a large number of buyers widely scattered geographically;

Assume that the product is relatively heavy in relation to its value, so that the cost of freight is a substantial element in the total cost of delivering the product at any considerable distance from the point of production;

Assume that there is also a considerable element of overhead cost; that is, cost of production of the product.

If those factors were present in an industry, would you say that the basing-point method or system of price quoting as outlined in either the hypothesis A or hypothesis
6391 No. 1 would be inevitable?

A. No, it would not be inevitable.

Q. Now, referring again to those assumptions as to the

existing conditions in a manufacturing industry, is it any part of economic theory that a basing-point method of delivered price quotations will normally, logically, or naturally eventuate out of these conditions?

A. No, it would not. The only possible exception I would have to make to my answer would be a reference to a previous use of the word "natural," and with that exception my answer would be "no."

Mr. MacIntyre: Will you read the last part of the question, just the last phrase beginning with the word "normally."

(Last part of question read.)

By Mr. MacIntyre:

Q. Now, referring to the basing-point method or system of delivered price quotations which is presented to you in this hypothetical question A, is the basing-point method as there presented substantially one that you as an economist would recognize as a competitive method of pricing and selling merchandise?

A. No, it is not an effective competitive method.

Q. According to any business behavior observed by you or studied by you as an economist, would the use of
6392 any such method arise naturally as the result of competitive forces?

Mr. Stewart: I am sorry, I did not get the first part of the question.

(Question read.)

A. No, not as the result of competitive forces.

By Mr. MacIntyre:

Q. In order to have such a method used would certain of its elements have to be planned in concert with other manufacturers or sellers?

Mr. Stewart: I object to that as leading.

Trial Examiner Norwood: Objection overruled.

A. Yes, some sort of concert, either actively agreed to or passively accepted.

By Mr. MacIntyre:

Q. Under the conditions stated in hypothetical question A, in your opinion as an economist, is each conduit manufacturing company selling in a single market, or in several markets, or in any market at all?

A. Under the assumptions outlined, there is no true

market; consequently, the conduit company is not selling in a true market; it sells under this basing-point method.

Q. Under the conditions stated in hypothetical question A, in your opinion as an economist, what advantages, if any, accrue to the conduit manufacturing company selling under that method?

6393 A. The advantages would be hard to name, I should say, without some very specific study of the operation of the plan in a given case. There must be mutual advantages, I should assume, otherwise the plan would not be used. There is a mutuality of refraining from underquoting in certain territory if a person who would be affected refrains from underquoting in other territory. That, I should say, would be the essence of the advantage to be gained.

Q. Under the conditions assumed in hypothetical question A, if the use of the basing-point method yields varying net amounts per unit of product to the conduit seller on sales made to different buyers, is or is not that result disadvantageous to the seller's customers to pay the higher mill nets?

A. I should say it is disadvantageous to the customers who pay the higher mill nets.

Q. Under the conditions of a basing-point system of delivered price quotations as outlined in hypothetical question A, would you as an economist expect to find identity of price quotations submitted by conduit sellers in bids for public openings?

A. Yes, I should think so. Assuming this formula is used by the industry, the answer would be "yes."

Q. Would such identity in such price quotations in such bids indicate to you as an economist the absence of competition among the conduit sellers?

6394 A. Yes, the absence of any effective competition.

Q. Let us assume that the evidence shows that a very substantial number of manufacturers of conduit submit to a contractor bids for his requirements of conduit for a proposed building, which are at the same delivered price, for the same quantity and kind and specification of conduit, for delivery at the same specified time.

Would you as an economist infer from that evidence that the sameness in price was due to an agreement or understanding or other collusive activity among the manufacturers?

FILED THROUGH a POOR COPY

Mr. Stewart: Well, there is the same objection to that question. It is not within the province of the witness.

Mr. MacIntyre: Well, I objected to that question when it was put to Dr. Fairchild, on the same ground, but he was permitted to answer.

Trial Examiner Norwood: Objection overruled.

A. I would say that there was evidence of some active of passive understanding.

By Mr. MacIntyre:

Q. Given that statement of facts, I ask you whether that result would naturally flow from the working of economic forces.

A. Certainly not naturally from the workings of any impersonal economic forces.

Q. Are varying factory net proceeds per unit sold
6395 inconsistent with the principle that prices charged by a seller in his sales to different buyers tend to be uniform under competitive conditions in any market?

A. Yes.

Q. In your opinion as an economist, are varying factory net proceeds per unit sold indicative of a failure of the seller to follow his self-interest in a normally competitive market when at the same time he is permitting sellers who produce at other points to take customers from him nearer his point of production?

A. Yes. It would be a case of mutual dumping.

Q. Assume that each conduit seller generally refrains from quoting f.o.b. its place of production or shipment prices that are—prices f.o.b. the place of production or shipment that are independent of and unrelated to delivered price quotations determined from a basing-point formula.

Would the fact that he so refrained indicate to you as an economist a lack of competition?

A. Yes; I should say a lack of effective competition.

Q. From your observations of business behavior and studies of economics, if a conduit seller generally refrained from quoting f.o.b. its place of production or shipment prices that were independent of and unrelated to delivered price quotations determined from a basing-point formula, to what would you as an economist attribute that refusal?

6396 A. To some mutual understanding or practice of

some sort that would make it profitable to mutually refrain from giving such quotations.

Q. If each conduit manufacturing company were forbidden to use the basing-point system of delivered price quotations by an order of a Government commission, in your opinion as an economist would that result in fostering or restricting competition?

A. I would say in fostering competition.

Q. One more question on this line on the same supposition: Assume such an order, would it result in generally lower costs of conduit to buyers?

A. I should say it would generally so result.

Mr. MacIntyre: May we have a three-minute recess?

Trial Examiner Norwood: Yes.

(There was a short recess taken.)

Trial Examiner Norwood: Go ahead. Back to the record.

By Mr. MacIntyre:

Q. Dr. Loucks, in paragraph 21 of the statement of facts, that is, hypothetical question A, it is stated that, "During the last eight years there has been as many as fifteen changes in the quotations of conduit prices published by various conduit manufacturers, the periods of time between the dates of such changes varying from less
6397 than a month to approximately a year and a half."

Now, assuming that that statement of fact is correct, would that indicate to you as an economist a lack of competition or absence of competition?

A. It would indicate a relatively high degree of rigidity in price, and that in turn would indicate some substantial lack of effective competition.

Q. How do you, as an economist, define the term "cross-hauling"?

A. Cross-hauling occurs, as I understand it, when the same product, homogeneous product, moves out of one area and into another at the same time some of it is moving from the second area into the first, at approximately the same time.

Q. Do you as an economist regard the existence of cross-hauling as an indication of competition or of monopoly?

A. Some sporadic cross-hauling could occur from time to time under conditions of effective competition. Regular continuous cross-hauling could not at all be considered a feature of effective competition. It could exist, I should

say on the—under some condition quite far removed from effective competition.

Q. If you were to assume that cross-hauling assumed such proportions as to involve mutual or reciprocal dumping what would your answer be?

A. That it could not occur under conditions of effective competition.

6398 Q. Is it a part of generally recognized and accepted economic theory that cross-hauling is an indication of the existence of competition?

A. Only in the sense that irregular, various, sporadic cross-hauling might occur under competition, under effective competition. Continuous cross-hauling could not be considered a characteristic feature of effective competition at all.

Q. Under the conditions assumed in hypothetical question A, or in hypothesis No. 1, is the cost of cross-hauling as there involved a burden to the buyers?

A. Yes, I should say so. It is a cost that has to be met. I don't see who else could meet it except the buyer.

Q. Assuming the existence of a state of effective or keen competition among sellers, then if the choice of a location of the production of one of them is near a market, in your opinion as an economist, would the advantages in transportation costs from the point of production to the buyer accrue to the customers in whole or in part?

A. Well, it would be a very strong tendency for those—those advantages to accrue to the buyer, some of them inevitably would under conditions of effective competition.

Q. As an economist, what do you understand by the term "administered prices"?

A. Well, an administered price is a managed price, it is a controlled price; it is a price either kept at a certain

6399 level or moved up and down for deliberate purposes of some sort in a way that would keep it from being responsive to supply and demand operating under effective competition.

Q. Do you as an economist consider that when a seller is using administered prices in his quotations and sale that he is using competitive prices?

The Witness: Will you read that, please?

(Question read.)

A. No. Those would not be effectively competitive prices.

Q. If there were an identity of quoted prices for a stand-

ardized commodity at a particular destination from which the sellers were located at different distances freightwise, would that identity of quoted prices indicate to you the absence of a competitive market, or the existence of an agreement?

Do you want the entire question read now?

A. I suppose so; yes.

(Question read.)

A. It would indicate the absence of a competitive market. It would indicate some active or passively accepted understanding or agreement.

Q. If a seller makes a practice of accepting from his various customers different sums of money per unit for his standardized product, and if there were not differences in the quantity or cost of selling involved, does that indi-
6400 cate to you as an economist a lack of competition?

A. Yes, a lack of effective competition.

Q. Under the conditions assumed in hypothetical question A, as an economist, will you state whether or not it is possible for a basing-point method of quoting prices to develop from the play of natural economic forces without any collusive or coercive activity on the part of manufacturers or wholesale distributors or agents selling rigid steel conduit for their suppliers or manufacturer principals?

A. It is not possible for such a system to develop out of the play of impersonal forces in an effectively competitive situation.

Q. Professor, how would costs be affected in any way if uniform f.o.b. mill prices were used instead of a system of basing-point delivered price quotations?

Mr. Stewart: I did not get that question.

Trial Examiner Norwood: Read it.

(Question read.)

A. In my judgment the costs would go down generally.

Q. In your opinion as an economist does mutual dumping serve to increase the output of the industry as a whole?

A. No, I don't see how it could. What one dumper may do to increase his own output, his own sales, by his dumping would simply be counteracted when the other person in the mutual dumping arrangement dumps on his next territory.

6401 Q. In your opinion as an economist does mutual dumping tend to increase the volume of production of an individual mill?

A. No, I don't see how it could.

Q. In your opinion as an economist, does simple dumping—that is, dumping by a single mill—tend to increase the volume of production of the industry as a whole?

A. No, because what the one firm that dumps would gain the firm on which it dumped would lose.

Q. In your opinion as an economist, does the basing-point system of delivered price quotations operate to reduce the costs to the buyers?

A. No, I don't see how it could operate in that direction.

Mr. MacIntyre: That is all.

Trial Examiner Norwood: Cross-examine him.

Cross-Examination by Mr. Gilpatric.

Q. Professor Loucks, you have used in your direct testimony here the phrase "basing-point method" without, however, defining your concept of it. Will you please give us a definition?

A. As I understand it, the basing-point method is defined as the use of certain base prices as of certain locations, and any quoted price always on a delivered price basis would be calculated by adding to that base price the freight from the most advantageous base, most advantageous
6402 in the sense that you would select the base which would give you the lowest total of a base price plus the freight.

Q. Would it conform to your definition of the basing-point method if at a particular point of time there were more than one base price at a particular basing point in an industry, with all the other facts being present which you have stated?

A. No.

Q. Why not?

A. Why, as I have—as I have studied the basing-point method, I have never encountered that situation, and I would not think of it as the basing-point system of pricing that I have encountered in my reading and study.

Q. I am asking you about a basing-point method of pricing.

A. Well, of course, any seller can quote a delivered price, and I suppose two sellers can quote two delivered prices to a prospective buyer. Those have—

Q. If they do—

A. Pardon me. May I complete?

Trial Examiner Norwood: Let him finish the answer.

A. (Continuing.) If they do I would call those delivered prices, but I certainly would not call them a basing-point system.

Q. Well, do you make a distinction between "basing-point system" and "basing-point method"?

A. Yes. In my own thinking I always use the
6403 term "system." I think in terms of the concept of a system.

Q. The phrase "basing-point method," then, does not have any significance to you?

A. "Basing-point method" would refer to the rather technical use of the formula in calculating quoted prices. A system, as I am using it, refers to the actual operation of the thing in practice as a whole.

Q. And you mean by that that where several manufacturers in a given industry are selling their product at prices which at a given basing point are identical, and one of them in the course of his quotations and sales of the product sells at a price more or less than that previously identical price, that there is a departure from the basing-point system?

A. If that is temporary, sporadic, possibly accidental, because of a mistake in applying the formula, something of that sort, I should say not.

Q. Suppose it happens in a substantial number of instances and is not due to any mistaken or erroneous use of the basing-point method?

A. I suppose I would have to ask you to define for me the word "substantial," first. It is a matter of degree and would be awfully hard to answer.

Q. Well, say, in more than 25 percent of the sales of a particular manufacturer who quotes prices on the basing-point method, and in those more than 25 per cent of
6404 sales his prices are at other than the prices at the same time of other manufacturers at the same base?

A. And this, I am to assume, is to continue as the practice of one-quarter of the makers of the quotations indefinitely, extended period of time, as a regular thing? I want to get my assumptions clear here.

Q. Well, over the course, we will say, of a year the sales of—25 percent or more of the sales of a particular manufacturer are at other than the base prices which were identical at the time, identical with the current base prices of other manufacturers.

A. That is an entirely different situation. You are talking now about one manufacturer. I thought you meant the entire group of manufacturers.

Q. I am asking you whether that one manufacturer is using the basing-point method of pricing under those conditions.

Mr. MacIntyre: As to what part of the sales now? May we have the question clear on that?

The Witness: As to all of his sales.

Trial Examiner Norwood: Well, now, let the counsel ask the question he wants to. If it is not complete, you may object.

Mr. MacIntyre: Well, I do object to it because the question is not clear. He has put a situation as to a part of the sales and another situation as to another part, and
6405 now he says, "What is he doing as to the basing-point system as to his sales?"

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Objection overruled.

Answer the question.

A. He is not using the basing-point method of quoting prices for all of his quotations, no.

By Mr. Gilpatric:

Q. Well, let me put to you a factual situation in the light of your answer. Assume that on a certain date, we will say for the sake of argument January 1, 1941, a manufacturer of conduit located at New Kensington, Pa., publishes a price card which represents an advance of 5 percent over his previously published price card and a similar advance over the published price card of all other manufacturers of conduit; has that manufacturer in selling under his revised price card, quoting prices under his revised price card, departed from the use of the basing-point method or system?

A. He, in arriving at that quotation, has not departed from a basing-point method of calculating his delivered price quotation. He simply established for himself a new starting point.

Q. He is still using the basing-point method of—or system of pricing?

6406 A. I did not say the basing-point system. I said that he was—he might well still be using the basing-point method or formula of calculating his price quotation, merely starting from a different original price.

Q. Well, now, you told me earlier that you did not use the term "method"; that you conceived this thing as a system. I want to know if he is still operating under the basing-point system?

A. He may well still be operating under the basing-point system because, as I tried to distinguish a while ago, the system applies to the totality, and departures from it by a single person, a single quoter, for some period of time—we know not how long; presumably short—would not in any way eliminate the system as a system in the totality of its operation.

Q. I am not asking you whether the system would be eliminated. I am asking you whether that particular manufacturer is operating under the basing-point system.

A. He may well still be operating under the basing-point system, as I defined it a while ago, yes.

Q. Well, from that answer doesn't it follow that identity of base prices of all manufacturers at a certain point of time are not an essential ingredient of the basing-point system?

A. I would assume that under this system there might be some change from time to time, but one change
6407 might precede the other by some very short interval. I don't see how it could assume the exact same second, everything coincided exactly.

Mr. Gilpatric: May I have the question read? It calls for a "yes" or "no."

Trial Examiner Norwood: Read the question.

(Question read.)

Mr. MacIntyre: I submit that the answer is responsive to the question.

Trial Examiner Norwood: Is that true or not true, Doctor?

The Witness: I don't think that could be answered. I would like to explain why it can't be, but I should say it can't be answered in that form "yes" or "no." I would be glad to explain that further.

Trial Examiner Norwood: That is the answer. That is all right.

By Mr. Gilpatric:

Q. Well, now, let me take another factual situation: Suppose that on a given day three different conduit manufacturers, whose card prices at, we will say, the Pittsburgh base, are the same, quote prices to individual buyers of con-

duit at varying discounts of, we will say, 2½, 5, and 7½ percent from the base prices shown on their cards. In so quoting and in making sales on the basis of such quota-
6408 tions, are those manufacturers operating under the basing-point system of pricing?

Mr. MacIntyre: I object to the question as being irrelevant—

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: I object to the question as being irrelevant and immaterial. We are proceeding here in this case not against departures from the system but against the system when it is used.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Objection overruled.

A. If this is a difference of very short duration, if there are other compensating factors involved that offset these differences, the basing-point system surely might well be working.

By Mr. Gilpatric:

Q. Is that the best answer you can give us?

A. Oh, I can go on if you like. I would be willing—perfectly willing to say that I can well imagine that the basing-point system in its totality does not work with perfection, that you would find minor temporary sporadic departures from it. Just as when I say "effective" competition, I do not mean perfect competition, when I refer to the basing-point system I do not mean something which operates
6409 with precise perfection. I did not mean to imply that.

Mr. Stewart: Mr. Examiner, may I suggest that you make plain to the witness that whether he likes the assumptions or not in the question, he must take them and answer the question that way and not assume something else. It seems to me he did not answer the question.

Mr. MacIntyre: I submit that is what the witness has done.

Trial Examiner Norwood: I am inclined to think so.

Mr. Stewart: I don't think so at all. He imagines things outside the question.

Trial Examiner Norwood: Proceed.

By Mr. Gilpatric:

Q. Would your answer be the same if the variations, differing discounts of the type I have asked you to assume,

were a continuing feature of the operation of the method of pricing in the conduit industry, not only for one manufacturer but for all manufacturers?

A. The conditions there are much too complicated for me to deal with. I don't—cannot answer. That will have to be simplified before I can answer that.

Q. I wish you would define, if you will, what the use of the word "system" implies to you since you have thought of this method of basing-point pricing in that sense.

A. I thought that I had done that. I will be glad
6410 to repeat. It is the operation of the system in its totality; it is the practices; it is the procedures; it is the actual results; it is the thing that happens; not with precise perfection, no. It is the thing in its totality with some imperfections. That is about the best I can do.

Q. Is it essential to your conception of the term "system" that there be some mutual understanding or agreement involved?

A. Yes; either some active agreement or some passive, tacit understanding, yes.

Q. Now, if we change the terminology from "system" to "formula," or method, is such an understanding or agreement a necessary part of your conception?

A. I will have to ask whether you mean the method as used by some one manufacturer, or the method as used by all sellers or nearly all sellers?

Q. Well, in your answers to me you have made these distinctions between the basing-point method and the basing-point system.

A. Yes.

Q. I am trying to find out what was in your mind when you made that distinction.

A. I will be glad to try to clear that up. I think of the method as a formula which any single manufacturer or all manufacturers may take and apply in a technical,
6411 arithmetic, calculating sense in calculating a price quotation. It is a technical way of putting down figures and adding and subtracting and dividing. That is the method.

The system, as I have said, is the totality of the operation of that sort of thing throughout, say, an industry. That is the best distinction I can make.

Q. With some agreement or understanding?

A. I said that some agreement or understanding, either

active or passive—tacit is a necessary part of the operation of the system; yes.

Q. But not of the method?

Trial Examiner Norwood: You mean the method is the application of the system?

The Witness: It is the totality of the operation of the system, yes.

I think there was another question there I did not answer.

Mr. Stewart: I think he has answered everything.

Trial Examiner Norwood: All right.

By Mr. Gilpatric:

Q. You said that an agreement or understanding was a necessary part of the operation of the system. What about the existence of the system? Or do you include that?

A. Yes. Yes. Yes.

Q. Now, assume, Professor Loucks, that the first
6412 manufacturer of a certain product—we will say, for the sake of being factual here, the first manufacturer of conduit—there being no other manufacturers at that time, decided to use the basing-point method or formula of computing prices, quoting and selling his product. At that stage would you characterize what that manufacturer has done as the basing-point system or the basing-point method?

A. Oh, it would be the basing-point system, because he is the totality, by the assumptions in the case.

Q. The use of the basing-point formula, then, by one manufacturer would constitute a system?

A. If he is the only manufacturer. That was part of the assumption.

Q. Where does the agreement or understanding come in?

A. Well, there is no one to have an agreement or understanding with. He is the whole works.

Q. So in that situation you do not have an agreement or understanding?

A. Well, obviously not. There is one manufacturer. He could not have an agreement with himself. That is your assumption, not mine. I do not want to be argumentative. I just want to get it clear.

Q. All right, we will add to this one manufacturer, whose operations you say constitute a system all by himself, an-

other manufacturer who independently and without
6413 communication with the first manufacturer decides to quote and sell his product by using the basing-point formula. Is he operating under a basing-point system?

A. Yes. They both would be, because the totality is there. Totality is the basing-point totality. They are both using it, by assumption.

Q. Even though I state in my question the assumption, on the basis of which your answer must be given, that there was no agreement, no understanding, tacit or expressed, and no communication of any kind between these two manufacturers?

A. But there is a tacit acceptance by each of what the other is doing, which I included in my concept of a tacit understanding.

Q. But I am not including that in my assumptions. I am assuming independent action by the second manufacturer.

A. The question can't be answered on that basis. Each is accepting what the other does; that is a tacit acceptance, an understanding, whatever you want to call it. There is no written agreement, I am assuming, for each to follow this procedure. They tacitly accept—each tacitly accepts that the other is using it. There is the mutuality.

Q. It is just inconceivable to you, then, Professor Loucks, that anyone can adopt the basing-point formula independently on his own judgment without accepting or having an understanding with someone else?

6414 A. Yes, it is, because that would be a substantial modification of competition. It could not happen if effective competition existed. There must be a mutuality there. There must be an acceptance of what the other fellow does. I do this; you do that. We each accept the action of the other in the sense that there is a tacit understanding, as I am using the term.

Trial Examiner Norwood: Well, would that be the case with one particular manufacturer if he found this system already in operation as between all the others? Couldn't he adopt that without any agreement or understanding?

The Witness: No. I would say even that constitutes a tacit acceptance, because he accepts what the others all do and he joins in and does the same.

Trial Examiner Norwood: I see.

By Mr. Gilpatric:

Q. Well, can you have this tacit acceptance that you refer to without an understanding?

A. Oh, I should say a tacit acceptance is an understanding. I do not see any difference between the two terms, as I was using them.

Q. What is your definition of "understanding"?

A. Well, a mutual—a mutuality, an acceptance of what the other person does when he accepts what you do. That is as near as I can get to it.

6415 Q. Does it involve any sense of obligation on the part of either party to the understanding as to continuing a particular course of conduct?

A. Well, you would continue it as long as the mutuality is there. I suppose at any time the mutuality can cease, upon which some party could discontinue the practice, and the other parties would feel no responsibility to him any longer. It is not a permanent, ever-lasting thing. It could be disrupted, or I suppose it could fly apart itself.

Q. Then, there isn't any sense of obligation?

A. Oh, yes, there is currently, absolutely.

Q. It is just terminable.

A. It is terminable in the sense that anybody can say, "I am getting out," because there is no force, irresistible force coming from outside in, from outside the industry keeping him in. He may stay in because he fears what would happen to him as a producer if he got out. There may be that pressure to continue. But that is not an irresistible thing. If he wanted to sacrifice his business, he could drop out of the system.

Q. Well, are all of your answers to this series of questions based on the fact that your conception of effective competition, as you have explained here, just does not admit any individual manufacturer acting independently adopting the basing-point formula or method of pricing?

6416 The Witness: I am sorry. I did not get that. Will you read it, please?

Trial Examiner Norwood: Read it.

(Question read.)

A. Well, I do not believe that a manufacturer could maintain it under an effectively competitive situation as a single manufacturer, if that is what you mean. I am not sure that it is.

By Mr. Gilpatric:

Q. Well, you answered my assumption of the second manufacturer coming into the field, acting independently, without any communication with the first manufacturer, by saying that that to you implied a tacit acceptance or understanding, and you went on to say that that was because he would not be acting in accordance with your concept of effective competition. Is that correct?

A. No. I lost the last part. I followed you up to your last sentence, but I do not see the connection of your last sentence to the former part of your statement.

Mr. Gilpatric: Will you read the question, please?

(Question read.)

A. No, I did not add the last sentence. That is not a part of my explanation.

Q. Well, why, then, do you say that the second manufacturer, on the assumed state of facts, no communication and no agreement with the first manufacturer, acting
6417 independently, adopts the basing-point method, is nevertheless acting pursuant to some tacit acceptance or understanding?

A. Because he accepts whatever responsibilities this practice put upon him and, as a mutual thing, the other man accepts toward him the same responsibilities. It is a mutual thing and may not be the subject of any agreement that is ever put in words or writing, or anything of that sort. It is a mutual acceptance of obligations.

Q. Even though he has no knowledge of the other manufacturer's operations?

A. Oh, I could not assume that there are only two manufacturers and neither had knowledge of the operations of the other. That would be going too far. I certainly was not assuming that.

Q. Well, is mere knowledge all that is required?

A. A knowledge of how the other man is pricing his product, what his quotations are, knowing something about costs in the industry, and so on, yes, I should think with all that in it it would be possible to know whether there is a mutuality.

Q. Well, does that knowledge constitute by itself tacit acceptance?

A. No, not the knowledge. The knowledge might be the basis for mutuality. It would not be in itself an agreement.

It would just be a body of knowledge as to what the
6418 other fellow is doing.

Q. Well, how do we get from the knowledge to an agreement?

A. There is no agreement.

Q. You just said there is an agreement.

Mr. Gilpatric: Read that last answer, please.

(Answer read.)

A. I said it would not be an agreement.

By Mr. Gilpatric:

Q. How does it get to be a tacit acceptance?

A. By mutual acceptance of the practice of the formula, this method of pricing, and a mutual acceptance of responsibilities of each under it.

Trial Examiner Norwood: Does that formula imply certain behavior on the part of other people besides themselves?

The Witness: Oh, yes. When the one producer—there are only two now, we are assuming—when the one producer adopts this.

Trial Examiner Norwood: Do you charge him with knowledge of that?

The Witness: I would certainly assume that he had knowledge of what the other man was doing, at least what his price quotations turned out to be, and some speculation as to how they were gotten; yes.

By Mr. Gilpatric:

6419 Q. I want you to explain what you mean by the word "responsibilities" as you used it in your last answer.

A. Well, in very specific terms, it would involve, in the operations of a basing-point system, a refraining from undercutting the other producer in your most advantageous territory so that he, too, can sell there.

Q. And that refraining is essential to the operation of the basing-point system?

A. Oh, yes, if it is mutually undertaken. It is part of the system, as I understand it.

Mr. Gilpatric: Read the answer, please.

(Answer read.)

Q. Well, how do you arrive at these obligations which you say are part of your concept of tacit acceptance from

just the mere knowledge by one manufacturer that the other manufacturer is using the same method of pricing?

Mr. MacIntyre: May I have the question?

Trial Examiner Norwood: Read it.

(Question read.)

A. Oh, I should say it is rather obvious to the second manufacturer. If he intends to use the same method, he expects the first one to use the method, too. I do not see that it would require a great deal of insight to see what has to be done in the case.

By Mr. Gilpatric:

6420 Q. I am just trying to bridge in my mind the gap between the only assumed fact that we have here, that is, the knowledge by the two manufacturers of one of the other's use of the basing-point method and what I understand you to say to be an essential ingredient of the basing-point system, namely, their obligation or responsibility to refrain from, for example, undercutting the other manufacturer in his home market.

A. Well, the thing that bridges the gap is a knowledge or belief on the part of each one that his greatest profit lies in maintaining this mutuality. That bridges the gap, acts as an incentive, if that is what you mean.

Q. You mean the obligation arises merely from the self-interest of a particular manufacturer?

A. Well, I am assuming that each follows his self-interest of the situation in which he finds himself a part, yes.

Q. Now, Professor Loucks, you were given a question by Mr. MacIntyre to express your opinion as to a situation in which was assumed that the total demand for conduit had decreased and yet there had been an increase in the base price. You answered, I believe, that that was inconsistent in your mind with effective competition.

A. No. There were some other assumptions in there, if I recall correctly.

Q. Well, what were the others?

6421 A. I think there was an assumption there about a large amount of unused capacity, or something of that sort.

Q. Is that the only other assumption that is necessary to your answer?

A. I thought there were three. I was basing my answer

on those three: A decrease in demand, a rise in price, and a considerable amount of unused capacity.

Q. Well, now, add to those three assumptions these two assumptions, that the demand for rigid conduit is inelastic, and, secondly, that simultaneously with these other conditions that we assumed that there took place a substantial increase in the price of the principal raw material.

Now, would your answer be the same?

A. Well, we would have to deal with those separately, I suppose.

Q. No. I want you to take that situation with those five assumptions and tell me whether or not—

A. I can't answer. I would have to know whether the increase in the raw material was enough to make up the total increase in price. I could not answer without knowing that.

Q. Well, for the sake of the question, assume that the increase in the price of the finished product corresponded with the amount of the increase of the raw material.

A. I can't answer on that basis. I am sorry. I don't know what "corresponds" means.

6422 Q. Well—

A. I would have to know whether the increase in the raw material price, the pipe, is entirely adequate to account for this increase in price.

Q. Well, I will ask you what you mean by "adequate."

A. I mean just that, that the whole amount of the increase can be accounted for by the mere rise in the cost of the raw material, if the increase in price is simply due to that, and you can find a mathematical relation between them.

Q. Well, assume such a relationship. What would your answer be?

A. Well, assuming such a relationship, the only thing that happens—has happened in that particular case is that the price has been put up to cover the increased cost of the raw material.

Q. And that result is perfectly consistent with your conception of effective competition?

A. Well, the original price is not competitive, I am assuming. That was the picture before. It is under the basing-point system, as I understand.

Q. Oh. So your answer originally was based on your

assumption which you put in there that the basing-point system was involved.

Mr. MacIntyre: Now, I object to that. It is not fair to the witness. He did not put in any assumption. It
6423 was put in by me, and the record so shows.

Trial Examiner Norwood: Objection overruled. He is asking him what his assumption was.

Answer.

A. Well, I assumed that we were talking about the conduit industry.

By Mr. Gilpatric:

Q. Well, was that assumption, that the question related to the basing-point system, the basis of your answer? In other words, would your answer always be that the condition was not consistent with your concept of effective competition if the assumption of facts included the use of the basing-point system?

A. Why, yes. Assuming that the raw material cost does not account for this increase in price; that is right.

Q. That is what I asked you a few moments ago.

A. I am very sorry. I did not understand it.

Q. Well, now, what is your answer?

A. I just gave it.

Mr. Gilpatric: Read the question.

The Witness: Will you read the answer, please?

Mr. Gilpatric: Read the question in which I added the two assumptions.

(Question read as follows:

"Q. Well, now, add to those three assumptions these
6424 two assumptions, that the demand for rigid conduit is inelastic, and, secondly, that simultaneously with these other conditions that we assumed that there took place a substantial increase in the price of the principal raw material.

"Now, would your answer be the same?")

By Mr. Gilpatric:

Q. Add to that the further assumption, which you say is necessary, namely, the relationship between the increase in cost of conduit and the price increase of the raw material. What is your answer to that question?

A. The relationship being that the increase in the cost of

the pipe is enough to make up the entire increase in the cost of the conduit; is that the assumption?

Q. Yes.

A. Then, this particular rise in price would show nothing at all about conditions of competition or monopoly. I could not tell anything about it on that assumption.

Q. It would not be inconsistent, however, with the existence of effective competition?

A. I am saying you could not tell anything about it.

Q. Do you agree with this statement, Professor Loucks, that in a competitive market the price will stabilize at the cost to the least advantageously situated producer which enters the market?

6425 A. I can't see much meaning in that statement. I am sorry.

Mr. Gilpatric: Read it again.

(Question read.)

A. You mean go there and stay there?

Q. That is the question.

A. No, I would not.

Q. You do not agree with that statement?

A. In an effectively competitive situation, no, it would not go there and stay there.

Q. I did not say stay there.

A. I asked whether you meant go there and stay there.

Q. I am referring to your definition of the law of uniform price or one price, which you testified to on direct, at any point of time.

A. The law does not say that the uniform price will be at the cost of the least efficient producer in the market. No, the law does not mean that at all.

Q. Well, go back and answer my question as to whether at a particular point of time you would agree with that statement.

A. If I have to answer that "yes" or "no," I would say "no."

Trial Examiner Norwood: Five minutes' recess.

(There was a short recess taken.)

Trial Examiner Norwood: Proceed.

By Mr. Gilpatric:

6426 Q. Before the recess I asked you whether you agreed with the statement that in a competitive market the price will stabilize at a particular point of time at

the cost to the least advantageously situated producer which enters the market, and you said it would not.

I want to change that last phrase to the least advantageously situated producer who is making sales in the market.

A. No, it would still not be true for a given point of time.

Q. You stated on your direct examination that mutual dumping has the effect of keeping the prices in the home market at either of the two producers carrying on the mutual dumping higher than what they would be if a uniform f. o. b. mill price system were in effect.

I would like to have you explain how you arrive at that conclusion.

A. Because if an f. o. b. mill system were in effect there would be an aspect of attempting to develop and expand your most profitable market, most profitable part of the area in which you are selling, and that attempt to add on to your most profitable sales by dropping the price a bit would go on until you have had a uniform price to all buyers to whom you were selling.

Q. Are you assuming in making that answer that
6427 the demand in this home market would increase as the price were reduced?

A. That the sales would increase. They might increase not only through getting some people who were using some of this product to use more of it, but possibly of finding additional buyers in that territory, and even possibly develop new uses, if you drop the price a bit.

Q. How would your answer to that question be changed, if any, if I asked you to assume that the fact is that because the cost of conduit—we will assume that is the product we are talking about here—is normally only a small part of the total cost of a building project the demand for conduit is not materially influenced by the prices payable for it?

A. If you mean, of course, that no additional sales can be developed regardless of how far the price drops, then, of course, what I said has to be changed.

Q. Well, all I am asking you to do is to take the facts I have given you and answer on that basis.

A. The demand is inelastic.

Q. Right.

A. If the demand for conduit is inelastic, it does not

mean that no additional sales at all could be developed by a dropping of price, in which case the same sort of thing might take place; my answer would be the same.

Q. Well, in making the answer to Mr. MacIntyre's question to you on direct that prices under the practice
6428 of mutual dumping would be relatively higher than they would be under a uniform f. o. b. mill price system, did you take into account the possibility that the manufacturers engaging in this practice of mutual dumping might increase their total volume by selling in the territory other than their home territories?

A. Yes. They could not do it if the dumping were mutual. It would be impossible. What he would gain by selling in the other man's territory, by assumption, he would lose what the other man sells in his.

Q. So your answer there assumed the same amount of sales by each manufacturer under either system?

A. No. If you had an f. o. b. mill system, I assume sales would increase because the price would drop. I may not be following you.

Q. Well, then, your answer, I take it from your last statement, depends on assuming an increase of sales under the uniform f. o. b. mill system over what you would have if you had a practice of mutual dumping.

A. Yes. I assumed if you went from a basing-point system to an f. o. b. system that that would reduce cost and reduce prices and, with some degree of elasticity, even though slight, sales, would increase.

Q. Now, is there any other respect in which changing from a basing-price system to a uniform f. o. b. price system the cost to the buyer would be reduced other than
6429 what you have just told us would result through increasing sales?

A. Oh, yes.

Q. What are the other respects?

A. Well, the costs themselves would be reduced, because you would be eliminating cross-hauling and the cost of wasting freight. The cost of freight when you are on an f. o. b. system all goes into the prices, and that would be eliminated if you went to an f. o. b. system. That was back of my whole answer.

Q. Which do you regard as the greater source of saving, the increased sales or the elimination of the cross-hauling?

A. Oh, I could not say that without a very specific study of the industry and the situation. It would require factual knowledge I don't have, they both being in the picture.

Q. If it is a fact that the total demand for conduit in the United States varies with fluctuations in building activity and the demand, therefore, at any given area likewise varies with fluctuations in building activity, and if variations in building activity in one area, and hence the demand for conduit in that area, do not generally correspond with the variations in other areas, what would you say as to the effect on the regularity of operations of particular conduit manufacturers in the event of the introduction of a uniform f. o. b. mill price system in place of a basing-point system?

A. That cannot be answered unless I know whether
6430 you mean an elimination of the basing-point system in just the conduit industry and leaving all other pricing as it is, or whether you mean an elimination of the basing-point system throughout all the other industries that may also be producing building materials. Unless I have that assumption clear I can't answer the question.

Q. Why not?

A. Because it would make a very great difference what the result was.

Q. Why?

A. Well, I can go on and elaborate on both conditions, if you like.

Q. Well, I would still like an answer to that question, with whatever additional assumptions you would like to make.

A. You mean I can use my own assumptions?

Q. Answer the question as best you can assuming any additional facts necessary.

A. All right.

If you assume, for instance, that you are creating or bringing a relatively important reduction in the price of conduit by shifting from one pricing system to the other, from a basing-point system to an f. o. b. system, all other prices remaining as they are; and if you further assume that the price of the conduit is a very insignificant portion of the total cost of every structure, or practically
6431 every structure, then I do not see how, by merely bringing this slight change in the price of conduit,

you are going to increase sales of conduit, if the only use for it is—

Q. Now—

A. I beg your pardon.

The Witness: I want to complete the answer, Mr. Examiner.

Trial Examiner Norwood: Let him finish the answer.

The Witness: Will you read the answer so far, please?

(Last part of answer read.)

A. (Continuing) —in the putting up of structures.

On the other hand, if we change the assumption and assume that in the elimination of the basing-point system you mean the elimination of similar systems which may be used, and therefore may influence the prices of other materials, some of which may be more important in building structure costs than conduit, the total elimination of the system as it may exist in other building material lines, then you might well have such a change in building costs as to substantially increase the sales of all the products that go into the structures.

By Mr. Gilpatric:

Q. Now, just what has all that got to do with the regularity of production about which I asked?

6432 Mr. Gilpatric: Read my question.

Trial Examiner Norwood: Read the question.

(Question read as follows:

"Q. If it is a fact that the total demand for conduit in the United States varies with fluctuations in building activity and the demand, therefore, at any given area likewise varies with fluctuations in building activity, and if variations in building activity in one area, and hence the demand for conduit in that area, do not generally correspond with the variations in other areas, what would you say as to the effect on the regularity of operations of particular conduit manufacturers in the event of the introduction of a uniform f. o. b. mill price system in place of a basing-point system?")

Mr. Gilpatric: Read that question.

The Witness: It would make—

Mr. Gilpatric: Read my question.

Trial Examiner Norwood: Read the question.

(Question read.)

A. I am sorry, I failed to bring in the regularity. The conditions that I have specified—you assumed elimination

of it throughout all the pricing areas, all the pricing industries, all industrial pricing, building materials—would create a flexibility of prices which, I think, personally, 6433 bringing my best judgment to bear on it, would substantially regularize the use of production facilities not only in the conduit industry, but in other industries supplying materials that go into structures.

Q. Well, now, suppose that we can't go that far; we only can assume here that this change in the pricing method takes place in the conduit industry. Then what do you say as to the effect on regularity under the other facts assumed in hypothetical question A, so you have the whole picture?

A. Well, if I am to assume—and my studies would rather indicate that I should assume, at least as one of the possible assumptions—that the prices in other building material industries—

Q. Now, I have got to ask you to stick to hypothetical question A. If you cannot answer the question, just say so.

A. I cannot answer it—

Q. All right.

A. —without additional assumptions.

Q. All right.

Now, you recognize, do you not, that under the conditions set forth in hypothetical question A, conduit manufacturers are selling in various parts of the country at the same time, are free to sell; you also agree that under those conditions a conduit manufacturer, we will say in Philadelphia, can, when his sales—when the demand for 6434 conduit falls off in Washington, sell in New York where the demand may be increasing?

Mr. MacIntyre: May we have the question read?

Trial Examiner Norwood: Read it.

(Question read.)

Mr. Stewart: He is asking him if he will agree with that.

A. Well, under the basing-point system he could sell in either place in the sense that he quotes an identical delivered price, yes. Any time he could sell either place.

By Mr. Gilpatric:

Q. Now, what would be the effect as regards the number of—the different territories—places at which a manufac-

turer could sell, if the uniform f. o. b. mill price system is introduced in place of the basing-point system?

A. I am not sure—would you read that again, please? (Question read.)

Mr. MacIntyre: I object to the question. It is going to a situation not in issue.

Mr. Gilpatric: Counsel for the Commission—

Trial Examiner Norwood: Objection overruled. Go ahead.

A. Well, under the basing—under the f. o. b. pricing system any producer can sell at any place that he could make a price quotation that was attractive to a buyer.

6435 By Mr. Gilpatric:

Q. Are there any limitations on the way you would expect a conduit manufacturer to sell under the f. o. b. mill price system?

A. Oh, yes, there would be a freight limitation in the sense that the buyer would have to pay for transportation after he has purchased it at the mill.

Q. Well, does that limitation operate to reduce the number of places where a conduit manufacturer could sell under the f. o. b. mill price system?

A. Yes, a conduit manufacturer under the f. o. b. system could sell at fewer places, in the sense that he could offer as attractive a price as his rival in fewer places than under the basing-point system; that is right.

Q. Now, is it inconceivable to you that that reduction in the number of places that a conduit manufacturer can sell would have some effect on his regularity of production?

A. The number of places at which he could sell is not fixed. It is limited, but it is not fixed. He can expand his territory by dropping his price. He can expand his sales within his territory by dropping his price. It is not a fixed quantity of sales. It is a geographic advantage he has in a given area because of freight. The two are entirely different things.

Mr. Gilpatric: Read the question, please.

6436 (Question read.)

Q. Try to answer that question.

Trial Examiner Norwood: Yes.

A. A single manufacturer, if on an f. o. b. basis, would have opportunities of developing his own home territory in such a way that under the price flexibility under that

system he might develop more regularity of use of his productive facilities than under a basing-point system. That is the best I can do on the thing.

Q. What is the logic behind that, this increasing, the manufacturer increasing his sales in his own home territory?

A. Why, the logic behind it is that there are at least three ways in which you can increase sales by reducing your price, and this would apply to your own home territory. First, you can find buyers who have not been using the product at all but will at a lower price.

Q. You are assuming that, then? You are assuming that such buyers can be found?

A. Yes.

Q. All right. What—

A. Talking in general terms, assuming that they can be found. Secondly, some buyers who have been using some of this product may at a lower price begin to take more of it.

Q. What is the third?

A. The third is that you may by dropping the
6437 price of this product have it used instead of some other product that is now being used by some people and increase your sales that way.

Q. If, as a matter of fact, in a conduit industry none of those results would follow, then what would your answer be? Would you still say there would be regularity of production under the f. o. b. mill price system?

A. There would be regularity in the sense that you could never sell any more than you are now selling, under your assumptions. You just keep on at that level indefinitely, regardless of price. Obviously that would be regularity. It might be 50 percent of capacity, but it would be regularity.

Q. Suppose I asked you to assume earlier that the demand in one of these areas, in this particular case the home market of a particular producer,—

A. Yes.

Q. —falls off, whereas it is increasing somewhere else,—

A. Yes.

Q. —somewhere not adjacent to this particular home area.

A. Yes.

BLEED THROUGH – POOR COPY

Q. Now, what is the effect on the regularity of the production of that manufacturer?

A. Under an f. o. b. system?

Q. Yes.

A. The regularity might not be any less. It
6438 might be more, because under an f. o. b. mill system he might enlarge his territory against the next fellow, and he might enlarge his territory against the next fellow. You would have a complete shifting about under a situation of that sort of your market area. The boundary between market areas is not rigid; it is flexible; it is fluid.

Q. Just what is the geographic pattern of pricing under which the conditions stated in hypothesis No. 1 would conform to your concept of an effective competitive situation?

A. Hypothesis No. 1? You will have to remind me what that is.

Q. That is Mr. MacIntyre's.

A. Well, that assumes a basing-point system, doesn't it?

Q. No.

Mr. MacIntyre: Yes, I think it does.

The Witness: Well, I am confused on the hypothesis.

Mr. MacIntyre: Here, I will give you this hypothesis No. 1 (handing hypothetical statement to the witness).

By Mr. Gilpatric:

Q. Well, let me add to my question the elimination of the basing-point system which you say is not in accordance with—is not a geographic pattern of pricing which conforms to your concept of a competitive situation—effective competition.

Mr. MacIntyre: Now, may we have the full ques-
6439 tion as it is amended?

Trial Examiner Norwood: All right.

(Question read.)

6441 Trial Examiner Norwood: I think you can answer that. It is hypothesis No. 1 with the basing-point features eliminated.

A. It is the conduit industry without a basing-point system? May I assume that?

Trial Examiner Norwood: Yes. That is right.

A. All right. In the conduit industry, under the facts

here assumed, without the basing-point system, without any use of the basing-point formula in calculating delivered prices by any producer, that is, a straight f. o. b. price at the mill, straight quotation all the way around, with the accompanying effective competition, no additional restraints imposed, each mill would have an area around it where it would have geographic advantages in approaching its customers. Its advantages would result from the cost of shipping the product out from the mill.

Q. Is that the only kind of a geographic pattern of prices which would conform to your concept of effective competition?

A. Well, effective competition would be what would bring the pattern into existence. The two are not synonymous. If you have effective competition without basing points or any other substantial restriction on competition, you would have these areas of advantage that I have described.

Q. Now, I believe you stated that varying mill
6442 nets or varying net factory proceeds, as Mr. MacIntyre has termed it, could only occur sporadically in a competitive situation?

A. That is right.

Q. Is that what you said?

A. Correct. Effective competition. That is right.

Q. You mean by that that varying mill nets may never result from competition?

A. No. I said "sporadically." They may result sporadically. That does not mean never.

Q. Well, what logical basis is there, in your opinion as an economist, for differentiating between varying mill nets which result sporadically under competitive conditions, and those which indicate a lack of competition?

A. Well, I differentiated between perfect competition and effective competition, and effective competition has in it certain impersonal imperfections that are there as the result of which you might have some sporadic variation in mill nets. It is that type of variation in mill net that I mean by sporadic, temporary, occasional, incidental.

Q. As an economist, do you find in principle any grounds for distinction between the practice of absorbing freight under the basing-point method and the practice of absorbing freight when any other type of method of pricing is used?

BLEED THROUGH – POOR COPY

A. Well, yes; under an f. o. b. system, as I have just testified, under conditions of effective competition you
6443 might have sporadic absorption of freight, variations in mill nets. Under a basing-point system with mutual dumping that I have testified that is inherent in the system, you would have a systematic, continuous variation in mill nets. That would be the difference.

Q. The distinction, then, depends on whether or not the absorption of freight or the varying mill net returns occur on a systematic basis?

A. That is right; systematic and continuous.

Q. In your conception of effective competition, does such competition exist where one seller of a standard commodity merely meets—that is, makes his price the same as—the price of a like seller in the same market, or is it essential for competition to exist that the one seller make his price lower than the other seller?

Mr. MacIntyre: May I have that question read?

Trial Examiner Norwood: Read it.

(Question read.)

A. In order for effective competition to exist, as I have been using the term, there must be from time to time be variations in these quotations, an actual range of quotations.

By Mr. Gilpatric:

Q. That is not what I asked you.

A. I am sorry. Would you read it again, please?

(Question re-read.)

6444 Q. Now, direct your answer to a particular point of time.

Trial Examiner Norwood: Yes. Just go right directly to that, Doctor.

A. There must occur points in time when the sellers make different quotations in order to have effective competition exist.

Q. Does that mean that you never have effective competition existing at a particular point of time when one seller is merely meeting the price of the other seller?

A. One seller may well meet the price of another seller, and there may still be other sellers who are not meeting that price.

Q. Just limit it to the two—

A. There are only two sellers?

Q. Yes. —in this question.

A. If that is a characteristic feature of the industry, there is not effective competition.

Q. I am not asking you about an industry. I am asking you to take those facts and give us an answer, whether that corresponds, in your conception, with effective competition, whether it is necessary for the one seller to go below the price of the other seller for effective competition to exist at a particular point of time?

A. It is impossible to answer the question, because each man can't be quoting under the other fellow at
6445 a particular point of time. The price would be zero. It is an impossible situation. I can't answer it. If each quotes below the other, it would be zero.

Trial Examiner Norwood: One quoting under the other.

The Witness: But each quotes under the other.

Trial Examiner Norwood: No; one quoting under the other.

The Witness: But as soon as you have a price the other man comes in and quotes under his price.

By Mr. Gilpatric:

Q. But was that your assumption?

A. No. It is not my assumption. It is not my answer.

Trial Examiner Norwood: Now, read that question. (Question read.)

Trial Examiner Norwood: All right, Doctor. Tell us whether or not competition would exist under those circumstances or whether it would require other factors for you to determine that?

A. I will have to have the privilege of explaining the answer.

By Mr. Gilpatric:

Q. You can get that on—

Trial Examiner Norwood: Let us have the answer, first, and the counsel on the other side will give
6446 you the privilege of explaining it.

A. I can't give a "yes" or "no" answer unless the—

Q. All right.

A. —unless the explanation accompanies the "yes" or the "no."

FLEED THROUGH – POOR COPY

Q. All right.

A. I am sorry.

Trial Examiner Norwood: There could be circumstances, you think, under which there would be competition where the only two parties quoting would quote identical prices?

The Witness: I think that might occur instantaneously, but if it occurred for any period of time beyond an instant like that (indicating)—

Trial Examiner Norwood: I am talking about instantaneously.

The Witness: That is right; if it occurred for any period of time, then it would be an evidence of a lack of effective competition.

By Mr. Gilpatric:

Q. In a competitive market would you expect the seller of a product such as rigid steel conduit to be raising and lowering his price quotations each time that an attempt was made to effect a sale?

A. Oh, no, I should not expect that.

6447 Q. Why not?

A. Well, he might—I should think there might be a possibility of making two sales within five minutes. They might both be made at the same quotation.

Q. In your opinion what would be likely to cause a change in the price quotations for a product like rigid steel conduit?

A. Under conditions of effective competition, f. o. b. mill prices? Is that right?

Q. No; under the conditions stated in hypothetical question A.

Mr. MacIntyre: It is all hypothetical A that you are talking about now, Mr. Gilpatric? May we have the question now as amended?

Trial Examiner Norwood: Read it.

Do you understand the question, Doctor?

The Witness: Yes, I think so.

Trial Examiner Norwood: Excuse us from reading it this time?

Mr. Gilpatric: All right.

A. Under those conditions there might be a number of reasons for changing the base prices in the industry, some of which might be the same reasons that would cause changes in price under effective competition and others of

which would be reasons which would not bring a
6448 change in price under effective competition. There would be two categories of reasons.

Q. Well, take the first. Take the ones that would be the same. Tell us what those are.

A. Oh, I should imagine that if—I will have to speculate on it. I should imagine that if over a long period of time—maybe not a long period of time; some extended period—the industry as a whole found that some substitute had been developed, and that it was cutting out from under them their sales at the existing price structure, after that went to the point where they found some necessity for writing off some of their assets, capacity, there would be a readjustment in price, there would be a readjustment in your base prices.

Q. How frequently do you think those conditions would take place, in your opinion as an economist?

A. Under a basing-point system, which we are assuming, I should think rather infrequently.

Q. Well, take your assumption of a uniform f.o.b. mill price system.

A. Much more frequently under that assumption.

Q. If a conduit seller were to reduce his price at one point, how far reaching would that action be, in your opinion as an economist?

A. Under a basing-point system or the f.o.b. system?

Q. Well, under both. Answer it under both systems.

6449 A. Under an f.o.b. mill system a reduction in the price instituted by one producer would extend the boundaries of his market area, boundaries of the territory within which he made sales, develop his territory extensively; it would also develop it intensively, finding new buyers at the lower price. The amount, the degree of that extension, there is just no way of conceiving that that I can see. It would depend on the existing situation when it happened.

Q. You have answered it under one set of assumptions. Now, give us the other.

A. Yes. Under the basing-point system a lowering of the base prices universally, some sort of a dropping of the level, would, I should assume, not change the pattern of prices. It would keep the sales territories or places where sales were made much as they were before. It might serve to offset the use of some substitute product that may have been the cause for this reduction; at least in part offset it.

Trial Examiner Norwood: That is, assuming that all the bases dropped at the same time?

The Witness: That is right. That is right.

By Mr. Gilpatric:

Q. Why do you assume that, Professor Loucks? My question only referred to the action of one.

A. We can take that. One base price drops, all the others remaining the same; is that the assumption?

6450 Q. I am asking you what would be the effects if one—

A. One base price?

Q. —dropped the price?

A. All the others remained as they are?

Q. No; I am just asking you what would be the effects if one—

A. I can't answer that unless I know what the others do.

Q. If you cannot answer that, then we will go on.

A. I am sorry.

Trial Examiner Norwood: Is the assumption there that one of them drops, and only one?

Mr. Gilpatric: I am asking him—

Trial Examiner Norwood: Is that clear?

Mr. Gilpatric: Yes, I am asking him that.

Trial Examiner Norwood: Can't you answer that?

The Witness: Yes, but he would not permit me to make the assumption.

Trial Examiner Norwood: You don't need to make the assumption. Just assume that one of them drops.

The Witness: And the others remaining the same, the effect would be, I should think, if the territory for which the base price had dropped had been the controlling base price, that that territory would spread out at the expense of the other territories.

Mr. Gilpatric: Let me have that question read and

6451 the answer.

Trial Examiner Norwood: I think those long questions there, when they have to be explained and everything—that the counsel ought to ask another question if he can do it. That involves too much to go back.

Mr. Gilpatric: Well, Mr. Examiner, I have got to insist with this witness he answer my questions without introducing additional assumptions and without attempting to modify the question. That is a perfectly good example. He assumes in his answer.

Trial Examiner Norwood: Well, he has answered that question. I have attended to it very diligently here, and it involves two or three questions and some amendments and some additions to it.

Mr. Gilpatric: No, not this last question. It is a very simple question.

Trial Examiner Norwood: I think so.

Go ahead. You can ask another question, if you want to, or after you get the record you may go over the ground again tomorrow morning.

By Mr. Gilpatric:

Q. When a manufacturer employs a traveling salesman which you mentioned—or which was referred to in one of the questions asked you on direct, what sort of instructions would you expect the traveling salesman to be given
6452 as to what price is to be quoted in order to have effective competition in your concept?

A. I should say that he would either have to have some power to make some adjustments, discounts, modifications in the price schedule he carries, or would have to be instructed to very quickly communicate back with his home office if it seemed to him desirable to make such concessions.

Q. Do you mean by that that the power in the salesman to make modifications without consulting the home office would be essential in order for effective competition to exist?

A. No, not if communication with the home office is easy, instantaneous, or—I mean practically so, within an hour.

Trial Examiner Norwood: Suppose that the salesman had instructions to meet competition.

The Witness: I should think even then the home office would have to set limitations upon that. Even if he had a range there within which he could work, you would have to set limitations, and under an active competitive situation I think his instructions would be that he should communicate back as quickly as possible if he finds it desirable to go below that.

Trial Examiner Norwood: Well, if he had no limitations, if he had instructions to meet competition without communication with the home office, would that be effective competition?

BLEED THROUGH – POOR COPY

6453 Mr. MacIntyre: May we have explained what is meant by the term "meet competition"?

Trial Examiner Norwood: That is, make the identical price he finds in the field?

The Witness: And do nothing but that? No, I would not consider that effective competition. May I explain why?

By Mr. Gilpatric:

Q. Go ahead. I don't care. It is the Examiner's question; not mine.

Trial Examiner Norwood: I think that is all right.

Q. Would the introduction of the uniform f.o.b. mill plan of pricing have any effect, in your opinion, on the number of salesmen employed in an industry such as the rigid conduit industry?

6454 A. Since it would shift the sales effort, so far as the type of effort is concerned, I should think it might reduce somewhat the sales staff that was needed. Also since it probably would mean that the sales staff would not have to travel over such a wide territory to make the new type of appeal as compared with the old type of appeal, there might be an actual saving in traveling time which would also save the staff. I should say in general it would reduce the sales staff necessarily.

By Mr. Gilpatric:

Q. Wouldn't that reduction in the size of the sales staff lead to less rivalry between sellers in an area?

A. Oh, no, because what I have described as the most effective price would focus your competition. The most important thing to the buyer is what you are talking about, and it is a thing that pops right out at you under the

6455 f.o.b. mill system. It does not under the basing-point system.

Q. Well, I wish you would explain how, with this reduction in the number of salesmen and the confining of sellers to fewer places which you say will result from the introduction of the f.o.b. mill price system, you have the same amount of rivalry between sellers.

A. You have a different type of rivalry. A shift in the type of rivalry is a shift from a type which by previous testimony I have pointed out is less the essence of rivalry in the economic price sense, in the economic competitive sense, than is price. You have had a shift in the type of

rivalry, which does not say at all that you have had a decrease in the intensity of rivalry. I say that you have had an increase in the intensity of rivalry, because you have focussed the rivalry on the essence of the bargain, so far as the buyer is concerned.

Q. How many sellers offering their particular product for sale in a market are necessary in focussing competition to that place?

A. Did you say how many sellers?

Q. Yes; must be present, either directly or through representatives, in order to have that focussing?

A. Well, more than two—more than one. I beg your pardon. More than one, in order to have effective competition in the full meaning of that term.

6456 Q. So that in your concept a true market only exists where there are at least two sellers?

A. In the sense of potential sellers, yes.

Q. No. I am talking about actual sellers.

A. Well, I am talking about potential sellers. I will have to shift the whole question.

Q. Well, now, I will do the shifting of the question.

A. All right.

Q. You do the answering.

A. Right.

Q. Answer that question on the basis—

A. Yes, sir.

Q. —of what number of sellers has to exist in a market in order to have it a true market. Is there any minimum?

A. "Seller" in the sense of a person who actually makes the sale, there is no minimum. "Seller" in the sense of a person who makes quotations, potential quotations and can get there, there is a minimum.

Q. Now, let us leave "potential" out of it. Actual sales and actual quotations, how many sellers are necessary?

A. I can't answer the question without giving a complete answer. A complete answer involves what I have said. I am very sorry.

Mr. Austin: Now, if Your Honor please—

Trial Examiner Norwood: Wait a minute. Read 6457 that question.

(Question read.)

Trial Examiner Norwood: To make competition—

Mr. Gilpatric: A true market, make a market.

The Witness: My answer—

Mr. MacIntyre: If Your Honor please—

Trial Examiner Norwood: Doctor, you are answering these questions here, and it is nothing but fair that you make the answers on the cross-examination here without adding any assumptions here. You take his assumptions there and assume that they are—well, let us see. You assume that there are two actual sales?

Mr. Gilpatric: I am asking him whether—

Trial Examiner Norwood: Assume that the sellers are actual sellers.

The Witness: In the sense of actual sellers, there is no minimum number of sellers necessary to make a true market.

Trial Examiner Norwood: Read that answer.

Would the presence of one make a true market?

The Witness: Yes, sir; that is what I meant.

By Mr. Gilpatric:

Q. All right.

Now, I want to have you assume an example which we used in the previous witness of two points of produc-
6458 tion, A and B, which, we will say, are a hundred miles apart; that the manufacturers at those two points have equal costs of production.

Now, under that set of facts, and in accordance with your concept of a market, where does the boundary between the markets of the two producers lie?

A. I am not sure I could think about a boundary in terms of a hair line of some sort. There is a division there, probably a band or an area of some sort somewhere midway between the two in which both of them will have about equal advantages in making their sales on the one side of which the one would have greater advantages than the other, and on the other side of which the second would have greater advantages.

Q. Assuming there is no differential freightwise in goods moving from A to B, and goods moving from B to A, so that you have no question of differing transportation costs here, and with the costs of production the same, would not that boundary be a band or a strip approximately midway between A and B?

A. Yes. With freight rates the same in either direction; that is right.

Q. Now, in the first place, do the areas on either side of that boundary correspond, according to your views as an economist, with a true market?

A. Yes, because there is nothing to keep either
6459 seller from selling into either territory if either one of the sellers charges a price or asks a price which makes it possible for the other seller to cross that line.

Q. Well, now, add to the assumed state of facts the location of a buyer at point O, which is half way between A and this boundary freightwise—in other words, the freight rate from A to the boundary, we will say, is 50 cents—and O was located 25 cents freightwise from A. Now, what alternatives in the sense of a choice between sellers does that buyer at O have?

A. Well, he has the alternative of buying from either one. He may have greater advantage in buying from one rather than the one.

Q. Will the buyer at B be offering his merchandise at O under the conditions I have stated?

A. He may if A's price is high enough.

Q. Well, we are assuming now that the cost of A and B is the same.

A. Oh, and the price quotation is the same f.o.b. point A, f.o.b. point B?

Q. Yes.

A. Well, in that case the advantage of the buyer at O would certainly lie in purchasing from seller A, definitely.

Q. Well, is the seller at B offering to that buyer?

A. Certainly. Certainly he is offering to O if O
6460 wants to pay the transportation cost of getting it to the place where he wants it.

Q. Well, how is that offer made?

A. Why, in an f.o.b. mill price at point B. That was in the assumption.

Q. Well, how would you conceive that the offer is communicated by the seller at B to the buyer at O? How does the buyer at O know about it?

A. Why, he may go and ask seller B. There are a lot of ways he could find out about it. For a couple of cents B could inform him by mail.

Q. Does that situation, under the facts I have given you represent an effective competitive situation?

A. Yes, certainly, in my opinion. I will elaborate on that if you like.

BLEED THROUGH – POOR COPY

Q. No, not as far as I am concerned.

You have testified in answer to a question by Mr. MacIntyre that if sellers seek to rival each other in stressing particular qualities of their respective products, in assuring prospective customers of the uniformity and dependability in the quality of their products, in emphasizing punctuality in delivery and other services, even though the sellers are quoting the same prices, that does not represent to you effective competition?

A. Yes, that is, the same delivered prices, does
6461 not represent effective competition. That is correct.

Q. Does it represent any kind of competition?

A. Well, it represents a form of quality competition or service competition, which I am saying is not effective competition because by and large price is the thing on which the forces of effective competition must focus.

Q. If a manufacturer improves the quality of his product instead of cutting the price, is the result there effective competition?

A. Improving the quality, keeping the price the same, is simply changing the product. You have a different situation. It is not the same commodity any more. You have a new price for a new commodity.

Q. Is the result of that change advantageous to the buyer?

A. Oh, it is advantageous to the buyer to have the sellers attempting to and actually achieving changes in the quality of their product, yes, it is desirable to buyers in general.

Q. You were also asked, Professor Loucks, whether, under the conditions assumed in hypothetical question A —that is, the second of the two large hypotheses that were referred to—whether the marketing plan outlined in that hypotheses could logically develop and continue to exist in an industry where competition prevails, and you said not under effective competition.

A. That is right.

6462 Q. Now, I am asking you whether it could develop and continue under any kind of competition?

A. Yes, some form that falls short of perfect monopoly but is substantially approaching a strongly monopolistic position. It would not necessarily be the complete absence of every single last detailed element of competition. That would not have enough competition in it of those

kinds that I have already specified that would make it effective competition.

Q. In your opinion, is effective competition a form of imperfect competition?

A. The two concepts are entirely different, and I could not say that effective competition is a form of imperfect competition. Effective competition, as I have been using the term, refers to a portion, but only a portion, of the variety and degrees of competition, all of which are included in imperfect and monopolistic competition, as those terms are generally used. It is a narrower term, it is a more restricted term, as I have been using it.

Q. Well, as I understand your definition of "effective competition," it presupposes that buyers have certain alternatives?

A. Yes.

Q. Now, if two sellers of conduit are offering to a buyer in New York conduit at delivered prices, at different delivered prices, is that required alternative, so far
6463 as price is concerned, met under your definition of "effective competition"?

A. It is a homogeneous product, I take it. There is more competition than if they were offered the same price; yes.

Q. Well, in so far as your definition requires the buyer be given an alternative as to price, is that requirement satisfied by that?

A. No, unless there are other conditions than that.

Q. We are just talking about the price alternative now.

A. At one point at a time?

Q. Yes.

A. No, I would not conclude from that that effective competition prevails.

Q. How many more alternatives than price have you got to have?

A. Well, I would have to know whether this is a continuous thing of each being free, of one to cut the other, or whether it is an accidental or temporary or sporadic thing, whereby on a certain day at a certain time it existed. That would all be in my picture, the picture of competition.

Q. I am not asking you to extend your answer over any period of time. I am just asking you that if at a particular point of time that takes place, that at that time there is effective competition?

BLEED THROUGH – POOR COPY

A. My concept of effective competition involves
6464 time, and I can't get it out.

Q. Now, you stated that your emphasis in determining whether effective competition existed was on price rather than on quality, delivery, and terms of sale. What did you mean by terms of sale?

A. Oh, I suppose the amount of time given the buyer to pay would be one, how it was to be delivered, when it was to be delivered, those things, details of the transaction in reference to delivery and payment.

Q. And you say that the existence of alternatives as to terms of sale, including the time within which the buyer has to make payment, is less important than some alternative as to price?

A. By and large that is correct; yes, sir.

Q. What is your definition, Professor Loucks, of the term "monopoly" as you have used it in your testimony?

A. I don't think I have used the term except in a qualified way, complete monopoly, or something of that sort.

Q. Well, you have certainly used the term "monopolistic competition"?

A. Yes.

Q. Now, what does the word "monopolistic" mean in that context?

A. "Monopolistic" means a—"monopolistic competition" means a situation in which there are some competitive elements, practices, and in which there are some
6465 monopolistic competitive practices, an intermixture of the two so it becomes hybrid and requires a hybrid term to describe it.

Q. What is a monopolistic practice?

A. Oh, monopolistic practice would—do you want an illustration?

Q. I want to know what makes the practice monopolistic.

Trial Examiner Norwood: He wants a definition, I think.

The Witness: Oh, a definition of a complete monopoly, complete and perfect monopoly—

Q. I did not ask you about complete monopoly. You used the phrase "monopolistic practice"?

A. Yes.

Q. Now, I want a definition of that.

A. "Monopolistic competition"—

Q. No. Now, let us stick to one thing, you see.

A. I can't split the hybrid term into two parts and define each separately. That is impossible.

Q. You used the phrase "monopolistic practice"?

A. "Monopolistic practice."

Q. And I am asking you to define it.

A. That is the "monopolistic." That is, "monopolistic practice" I am asked to define; is that right?

Trial Examiner Norwood: Correct.

The Witness: A monopolistic practice would be a
6466 practice or a procedure which substantially reduces the alternatives that the buyer must have in order to have an effective competitive situation. I can illustrate if you would like.

Q. How do you apply that definition in determining whether under a given set of circumstances you have monopolistic competition or effective competition? I assume there is a distinction in your mind between the two.

A. Well, they overlap. That is the difficulty. Imperfect or monopolistic competition, as I have been using the terms, include my term "effective competition," which refers to a much narrower range of possibilities up toward the purely competitive. They overlap, which makes the question somewhat difficult. I can cite you, if you want, different practices which are imperfect competition or monopolistic competition, and yet are not effective competition. I can go into that if you would like.

Q. How can we tell from your answers whether or not when you refer to effective competition—or monopolistic competition, you are including effective competition?

A. I have not used the term "monopolistic competition" except to define it. I have not used it in any of my answers, so far as I am aware, except to give a definition of it.

Q. But your definition of it does include effective competition?

6467 A. I don't like that way of saying it, and I would not agree to that way of saying it. That is not a correct representation of the evidence that I have given—testimony that I have given.

Mr. Gilpatric: Let me have the next-to-the-last answer of the witness read, just what he said.

BLEED THROUGH – POOR COPY

Trial Examiner Norwood: Off the record a minute.
(Discussion off the record.)
Trial Examiner Norwood: Recess until 9:30 tomorrow morning.
Mr. MacIntyre: In this room?
Trial Examiner Norwood: In this room.

(Whereupon, at 4:25 o'clock p. m., March 13, 1942, the hearing in the above-entitled matter was adjourned.)

6469 Proceedings.

Trial Examiner Norwood: The hearing will come to order.
Pursuant to adjournment on yesterday, the hearing in Docket 4452 is reconvened at 9:30 o'clock a. m., Eastern War Time, in Room 532, Office of the Federal Trade Commission, Washington, D. C., the 14th day of March, 1942.
Please note the appearances.
Dr. William N. Loucks will resume the stand.
Proceed.

WILLIAM N. LOUCKS resumed the stand and testified further as follows:

Cross-Examination by Mr. Stewart (Continued).

Q. Professor, do you recall that yesterday you declined to answer a question of Mr. Gilpatric's containing the word "substantial"?
A. I do not recall the specific question. I declined to answer several, yes.
Q. You what?
A. I declined to answer several questions yesterday. I do not recall the specific question to which you refer.
Q. Well, if you did, and the record shows that you did so decline, what was your reason?
6470 A. I couldn't answer that without having the question. I am sorry.
Trial Examiner Norwood: Well, I think the witness may be using that term in a non-technical sense.
Mr. Stewart: Well, that is what I am trying to find out.
Trial Examiner Norwood: He did not decline to answer.
Mr. Stewart: Yes, he refused to answer the question.

Trial Examiner Norwood: He stated that he could not answer such a question there. I never understood in a single instance that he declined.

The Witness: Oh, no, I did not mean that. I just stated I couldn't; yes.

By Mr. Stewart:

Q. On page 6403 of the record you were asked this question:

"Because it happens in a substantial number of instances and is not due to any mistaken or erroneous use of the basing-point method?"

That was the question.

Your answer was:

"I suppose I would have to ask you to define for me the word 'substantial' first. It is a matter of degree and would be awfully hard to answer."

6471 Do you remember that?

A. I would have to go back a bit. What was the question? What is this all about? What does this "substantial" refer to? I don't get the connection. I am sorry.

Q. All right, I will go back further.

Mr. MacIntyre: I would like to ask Mr. Stewart if that is what he was referring to, what he has just read, when he said there was an instance where the witness had declined to answer.

The Witness: Well, Mr. Examiner, if I may say, I do not want the record to show that I have refused in the sense of just flatly said I would not answer any question.

Mr. Stewart: I did not say you did.

The Witness: I understood after the Examiner talked to you that that may have been what you meant. I want the record to show absolutely that that is not the case.

Trial Examiner Norwood: Well—

The Witness: There were several questions I could not answer.

Mr. Gilpatric: The record will show on that.

The Witness: Fine.

By Mr. Stewart:

Q. Now, what I want to know is, having called your attention to the question and answer, as to whether or not you would adhere to that point of view in all ques-

6472 tions which had been asked you in which the word "substantial" was used.

BLEED THROUGH – POOR COPY

Mr. MacIntyre: Now, I object to the question because the witness has already requested the counsel to inform him as to what question that this word "substantial" goes to in this instance.

Mr. Stewart: I hand the witness the record, page 6403, and other pages, and he can examine it to his heart's content (handing record to the witness).

Trial Examiner Norwood: Yes.

Answer the question.

Mr. MacIntyre: Now, read the pending question.

(Question read.)

Mr. MacIntyre: I further object to the question on the ground that it does not refer to any specific question, but now asks the witness whether or not he would want to limit all the testimony that he has given in the case irrespective of the question. Now, that goes without saying as to whether or not it refers to a question in which the word "substantial" had some limitation placed upon it.

Mr. Stewart: We will get to that. Just wait.

Trial Examiner Norwood: Please read that question.

Mr. MacIntyre: I can't understand why they do not care to inform the witness what question that they want to ask him.

Trial Examiner Norwood: Read the question.

Trial Examiner Norwood: The objection is overruled.

6473 (Question read.)

He may ask that. The witness may answer, if he can.

A. Whenever I used the word "substantial" I referred to a matter of degree. The word "substantial" means a matter of degree. Degree may vary from case to case. It is a matter that has to do with the individual matter under consideration, and certainly by "substantial" I would not mean exactly the same degree in each case expressed in some quantitative terms.

By Mr. Stewart:

Q. Well, then, calling your attention to the hypothetical question No. 1, in this language, page 4: "Assume also that substantial shipments are being made by rigid steel conduit manufacturers," and so forth, how did you use the word "substantial" there?

A. This is not my use of the word "substantial." You are asking me to interpret what I understood it to mean when I answered on the basis of this question.

Q. Well, necessarily, Doctor, you would have to interpret it in order to answer the question, I assume.

A. Yes. I want it clear I am answering it.

Q. Well, anybody would understand that.

A. Pardon me. I just want it clear.

Q. Well, you wouldn't have any difficulty with me
6474 in that respect. I can read English.

A. That is fine.

"Substantial" here I should say would mean more than several, certainly nothing like as much as—nothing like as must as a third of the total, or anything like that.

Q. All right.

A. I should interpret it to mean that.

Q. All right, let us go over to the next paragraph on the next page:

"Assume that so-called Chicago base price is substantially higher than the so-called Pittsburgh base price."

How much higher would your idea be for the use of the word "substantial"?

A. Well, the rest of the assumption here is,—"but not by an amount which is equal to the rail freight from Pittsburgh to Chicago." So that is a limitation on it in the first place.

Q. Well, I am asking you, sir, what is your interpretation of the word "substantial" in there—"substantially higher"?

A. Something less than the rail freight from Pittsburgh to Chicago.

Q. All right.

Now, in the next paragraph:

"Assume also"—

Trial Examiner Norwood: You mean sufficiently less to change the results in any way?

6475 The Witness: No, not that much.

Trial Examiner Norwood: It would enter into the results?

The Witness: No.

By Mr. Stewart:

Q. Now, in the next paragraph you notice:

"Assume also that substantial shipments are being made by rigid steel conduit manufacturers," and so on.

In what sense were you using the word "substantial" there?

BLEED THROUGH – POOR COPY

A. Some degree which is not sufficient to affect the net results of the operation of the basing-point system.

Q. And I suppose in the fourth line from the bottom you used the word "substantial" in the same sense you just defined it?

A. Yes, the same sense.

Q. Now, will you go back to page 2, please, and in the middle of the second paragraph do you notice the language, "which is reputed by them to be a rail freight rate"?

A. Yes.

Q. In what sense did you use the word "reputed" there?

A. That it is a freight rate which is assumed by the quoter to be the rail freight rate.

Q. Now, then, down in the third line from the last of that paragraph the language "they do not represent actual or exact transportation costs." Do you notice that?

6476 A. Yes.

Q. Did you use the words "actual" and "exact" synonymously?

A. No. I should think they might refer to two separate things.

Q. Well, tell us now how you interpreted it.

A. Well, when they do not represent actual transportation costs, that means that they have no real relationship to transportation costs. "They do not represent exact transportation costs" means they may have some relationship, but there is not a precise equality between the two things.

Q. Well, now, is that susceptible of a different interpretation, as you understand it?

A. I don't see how it would be, no.

Q. I see.

Now, go back to page 4 of the same question and the first paragraph on the page, the fourth line from the bottom of that paragraph, in which the language "systematically varied" is used. How did you interpret that?

A. I interpreted that to refer to some pattern of variations in which there was some constancy of pattern to which there was some regularity.

Q. Well, in other words, it is correct to say that your interpretation of that would be that as it is used there, there could not be any other conclusion except that that was done systematically?

6477 A. I don't understand your question.

Q. Well, how do you use the word "systematic-

ally"? You have used "basing-point system"; you have used other terms here.

A. Yes, it refers to a system as some organization form or pattern of something that is a totality, including things which continue to bear the same relationships to each other, not maybe with exact precision, but in general.

Q. And from which the results inevitably follow?

A. What results?

Q. Well, any result that might be the result of the system that you refer to.

A. Of course, always a system, if a system is operating, leads to some results. What the system is will determine what the results will be in part. Anything that bears on the system outside the system itself will help to determine what the results will be.

Q. Well, take the basing-point system as you conceive it to be. Is the inevitable result of it that you have uniform prices at destination?

A. Not in the sense that every single instance of delivered prices that you can find will be in precise uniformity, precise identity. I testified yesterday to the possibility there may be imperfections in the workings in this system just as there may be imperfections in the workings of
6478 any competitive system.

Q. Now, directing your attention to the way in which the basing-point system works, as you conceive it to be, would you concur in this description of the basing-point system: "It is a formula or method of pricing which when appropriately observed and implemented by certain methods automatically produces identical delivered prices for all sellers at any given destination. The success of the system depends, in the first place, upon a common requirement that each seller sell only at delivered prices and a common refusal to sell or quote f.o.b. mill and allow the purchaser to take his purchases anywhere he likes and in any mode of conveyance he likes"?

A. That, I should say, is a description of the system operating with perfection.

Q. I am asking you if you concur in that description of it.

A. That is the description of the system when it operates with perfection.

Q. Well, if it does not operate with the factors described there, then it is not operating; is that right?

BLEED THROUGH – POOR COPY

A. Oh, no. It may depart from this and still be operating, but operating with slight imperfections.

Q. I see.

A. I will go on and explain what I mean if you like.

Q. No. That is sufficient.

6479 Now, I ask you whether or not you are of the opinion that the matter of—that is, the problem of—the basing-point system is fundamentally an economic one?

A. Well, there is no—

Mr. MacIntyre: Now,—

The Witness: Pardon me.

Mr. MacIntyre: Will you please read that question?

By Mr. Stewart:

Q. Just "yes" or "no."

(Question read.)

A. I can't answer that unless you let me tell what I mean by "fundamental." That is clear, I think. I will be glad to answer the question if I may explain my answer.

Q. Well, you answer "yes" or "no" and then explain.

A. Well, you give—

Trial Examiner Norwood: Answer the question first and then you can have ample opportunity to explain.

A. No. My answer is "no."

Q. Well, then, there is no necessity for explanation.

A. Oh, I beg your pardon.

Trial Examiner Norwood: You can go on and explain there.

A. (Continuing.) I mean by that that I cannot say that the basing-point system and the results of the system are fundamentally an economic problem because there may

6480 be other aspects to the problem which I don't even know about which may be of more importance, particularly in the long period. I know of the economic aspects of the problem, and those are very important. I would not say that the problem is solely and fundamentally an economic problem. It has many, many aspects.

Q. All right. Now, would you care to give us an economist's definition of an agreement?

A. The economist doesn't define the term "agreement." It is no economic term.

Q. Well, that is what I thought. Well, then, what is the definition of an agreement?

A. You mean a dictionary definition?

Q. Well, you talk about agreements and understandings

and tacit agreements. I want to know what you mean by the use of the term "agreement."

A. I think I have used two terms, active agreement and passive or tacit agreement. I will be glad to define both of those.

Q. Well, first, define "agreement" for me, and then start that way.

A. Well, "agreement" means an understanding.

Q. Well, does it require a meeting of the minds of the persons involved in the agreement?

A. Not in the sense that they have to get together
6481 and talk things over and get something down in black and white, no.

Q. Well, in any sense?

A. It requires a mutuality, the term I used yesterday, I think it requires that, but not in any specific form.

Q. I am asking you, Doctor, does it require a meeting of the minds?

A. "A meeting of the minds" is a term that does not mean much to me, and I can't answer that question.

Q. All right. That is sufficient for me.

Now, would you say that if "A" announces a price on a product, and the same day a few hours later "B" announces the same price on the same product, that from that the inference is justified that A and B have agreed on that price?

A. No.

Q. Now, let us assume that several more announce the same price, and that continues for a considerable period; that is, that same price. Would you say that all those competitors have agreed on the price?

A. I would say that the longer it continues and the more people there are who sell—offer to sell at that price the stronger is the inference that there is an agreement upon it or something equivalent to an agreement.

Q. Well, let me ask you if you agree with this statement: Assume that competitors independently owned, acting on their own judgments, and as a matter of busi-
6482 ness expediency, commonly follow prices announced by the largest of those competitors. Would that indicate to you an agreement on prices?

A. It might indicate a tacit agreement, as I have used that term yes.

Trial Examiner Norwood: Would there be any alternative there?

BLEED THROUGH – POOR COPY

The Witness: If this is done consistently over a period of time it is a practice referred to oftentimes as price leadership, and price leadership, as I understand the term, implies a mutuality or a tacit, passive understanding in the sense that I have been using that term.

By Mr. Stewart:

Q. And you would say as an economist that it was economically unsound?

A. Oh, no, I would not say it was economically unsound. I say it isn't effective competition.

Q. All right. Then, it is not effective competition—

A. Yes, sir.

Q. —according to your ideas of competition?

A. That is correct. That is correct.

Q. I see.

Would you agree with this statement: "When the merchant fixes the price at the level of his competitors he is fixing it in competition with his rival just as much as though he named a lower price. The competition of his rival
6483 has prevented him from charging a higher price. If, on the other hand, he finds that he cannot move his goods at the price fixed by his competitors he will naturally lower the price and this will establish a new level. This is the essence of what constitutes competition"?

A. Both of those taken together would constitute competition.

Mr. Stewart: Read the question to him, please.

Trial Examiner Norwood: Read it.

(Question read.)

Trial Examiner Norwood: Answer it.

By Mr. Stewart:

Q. I asked you if you agree with that statement.

A. I have answered it.

Trial Examiner Norwood: Oh, I see.

Q. What is the answer?

Mr. MacIntyre: Please read it.

The Witness: Read the answer.

(Answer read.)

Q. Are you asking me that question, or is that your answer?

A. No; that is my answer.

Q. Oh, I see.

A. That is my answer.

Q. I see. What do you mean by "both of them taken together"?

A. I mean that both a meeting of the other per-
6484 son's price and from time to time undercutting that price, both together as practices commonly carried on are signs, very definite signs, of effective competition.

Q. Well, then, you do agree with the statement?

A. As explained, yes.

Q. All right.

Now, assume a trade usage which has grown up in the fabricating business to use a system of delivered price quotations, and also assume that there is no custom to refuse to quote f.o.b. mill. Would that indicate to you a competitive situation?

A. The two assumptions are mutually inconsistent, as I understand it.

Q. All right. That is your answer.

Trial Examiner Norwood: Read that question again.

(Question and answer read.)

Q. Now, Professor, you said yesterday in your statement of qualifications that you were the author of certain publications, and among them was one on price fixing—The Consumer Faces Monopoly—and (A Study of the NRA). Where was that published?

A. That was published in the annals of the American Academy of Political and Social Science.

Q. When?

A. Some time during 1933 or 4. I would have to
6485 check up on it.

Q. May I ask, does that article indicate your opposition to the N.R.A.?

A. Oh, no.

Q. Now, you also stated in your qualifications that you had assisted in the preparation of the Temporary National Economic Committee Monograph No. 21, entitled "Competition and Monopoly in American Industry"?

A. That is correct.

Q. What portion of that document did you prepare or assist in the preparation of?

A. I did some of the research work, and as the monograph was finally put together those pieces of research work are scattered all the way through, so that portions of various descriptions, practices in various industries, came from me.

BLEED THROUGH – POOR COPY

Q. I see.

Now, what if anything did you have to do with the preparation of the article on the delivered price systems?

A. I worked on some of that, yes.

Q. Well, do you subscribe to the statements in the section?

A. Well, I do not take any responsibility for the monograph as a whole. Some of those—

Q. I am asking you as to that particular section.

A. Which particular section is that?

Q. Delivered Price Systems.

6486 A. No. The steel sections of that I worked on particularly.

Q. Steel—

A. Some of the other delivered price sections I had nothing to do with.

Q. Steel section?

A. Steel section.

Q. Well, I have the steel section now. Are you the author of this statement:

"Economists who have studied the problem have disagreed as to the causation of the basing-point practice, some of them holding it to be the consequence of conditions of demand, technology, and cost inherent in the production of steel, others finding its origin in the profit seeking propensities of those who held the power to impose it on the industry. They have also differed concerning the relative desirability of this system and other possible methods of pricing steel."

Do you recognize that as yours?

Mr. MacIntyre: Just a moment.

Before there is any answer given to that question, since there is an identification of the record of where that comes from, I now ask that the document, particularly the pages from which it was taken, be marked for identification.

Mr. Stewart: Oh, quite all right with us. That is page—

6487 Mr. MacIntyre: I want it marked.

Mr. Stewart: Well, it is an official document, and I would assume that all we need to do is to refer to the page.

Mr. MacIntyre: No. I want it marked for identification as an exhibit in this case.

Mr. Stewart: Well, of course, that is—

Mr. MacIntyre: Because any reference you have given might require some explanation of the statements on other pages.

Mr. Stewart: Now, Mr. MacIntyre, this is an official document. All you have got to do is get it and read it.

Mr. MacIntyre: Yes, but I want the Reporter in this case to mark the page from which you take that statement.

Mr. Stewart: I am quoting from page 150.

Trial Examiner Norwood: I really don't see any necessity to mark it.

Mr. Stewart: No; it is foolish.

Trial Examiner Norwood: He can cite the book and the page.

Mr. Stewart: Certainly. Certainly.

Mr. MacIntyre: It is simply this, if Your Honor please: That if the statement—

Mr. Stewart: I will let you have it.

Trial Examiner Norwood: It is available to you.

6488 Mr. Stewart: Certainly.

Mr. MacIntyre: But if the statement that Mr. Stewart has read is not in itself sufficiently explanatory and needs some of the context, then I want the context marked because I might want to introduce the entire statement with all of its explanations into evidence if the witness answers the pending question, and for that reason, in order to keep the record perfectly clear as to what the statement is, I want the paper marked for identification.

Trial Examiner Norwood: I think the record is clear.

Mr. Stewart: It is perfectly clear.

Trial Examiner Norwood: I don't think it is necessary to mark it.

Did you state the page there?

Mr. Stewart: Yes, sir; page 150—well, we will get the official document. Senate Committee Print—Investigation of Concentration of Economic Power—Monograph No. 21—Competition and Monopoly in American Industry, being the document referred to in the statement of qualifications of the witness.

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: Now, may we have the question read with the statement?

Trial Examiner Norwood: Read the question.

6489 (Question read.)

Trial Examiner Norwood: Answer that.

BLEED THROUGH – POOR COPY

A. I am not sure the wording is mine, but I subscribe to that.

By Mr. Stewart:

Q. All right.

Mr. MacIntyre: What is the page on that again?

Mr. Austin: 150.

Q. At page 155, under "Cement," did you study that problem?

A. Cement I gave some attention to, but I don't think I did all the work on cement.

Q. Well, let me ask you if you are the author of this statement—

Trial Examiner Norwood: Now, I think you had better show him the statement and ask him if he is the author, and then you may question him about it, but I don't like to have that book read into the record and then give the other side an excuse to put the rest of it in and start something. If it is something that he accepts the authorship of, of course you may read any and all of it.

Mr. MacIntyre: Well, I feel that he has already gone that far with the statement he had in there over my objection before and got an answer to it.

Trial Examiner Norwood: Well, we cannot help that now.

6490 Mr. MacIntyre: Yes, but I objected to any answer being given as to any statement that was read specifically from any document.

Trial Examiner Norwood: I don't think any harm has been done.

By Mr. Stewart:

Q. Well, I show you the statement at the bottom of page 155 beginning—I am just going to quote you the first four words: "There is abundant evidence." Is that your statement?

A. Yes, but I want to look—get the setting of the thing here.

(After examining statement.) Well, that may not be my statement, but it is probably based on some statement I did make, so it is equivalent of it, I suppose.

Mr. Stewart: All right. The witness having made that answer I should like to read that in evidence.

Mr. MacIntyre: Well, now, unless the statements in explanation of it and upon which it would happen to be based

are included, I object to a small fragment being taken out of a context and being put on the face of the record here.

Trial Examiner Norwood: The statement has been adopted by the witness.

Mr. MacIntyre: But with qualifications as to what it is based upon.

Trial Examiner Norwood: And he is on the wit-
6491 ness stand to explain it, to explain the context.

Overrule the objection.

Mr. Stewart: Well, I will ask him one or two more questions and then I will ask him a general question, and probably we will get to this.

By Mr. Stewart:

Q. I show you a statement on page—

A. Mr.—Mr.—pardon me. I want the record to be clear on that.

Is there any reference to any specific statement for which I accept the responsibility? As I recall it—

Trial Examiner Norwood: I think the one he cited to you there—

The Witness: He did not cite that.

Trial Examiner Norwood: —he did not read into the record.

The Witness: That is right. Now, may the record be clear as to that, because I want no responsibility for statements not in the record as to its context.

By Mr. Stewart:

Q. Well, probably you don't understand, Doctor, but your friend over here on your side of the case is objecting to my putting it in.

A. But the question still stands, "Do I recognize the statement?" and my answer still stands. It does not
6492 mean anything now as it stands there.

Q. That may well be, but you are not running the record.

Trial Examiner Norwood: That is not controlling. It is what the record shows you said with regard to it that is controlling.

Go ahead.

By Mr. Stewart:

Q. I call your attention to a statement on page 151 of that document beginning with the language "According to the Federal Trade Commission."

BLEED THROUGH – POOR COPY

Mr. MacIntyre: What is the page?

Mr. Stewart: 151. You sit still. I will hand it to you. I don't want you to get tired.

By Mr. Stewart:

Q. Are you the author of that statement?

Trial Examiner Norwood: Now, I wish that you would just answer that "yes" or "no," that question, whether you are the author.

Mr. Stewart: I am trying to conform to your views now.

Trial Examiner Norwood: Yes.

A. Well, it is merely a quotation from the Federal Trade Commission. I am not the author of that.

By Mr. Stewart:

Q. I am asking you if you are the author of that statement.

6493 A. I am the author of the part that is not in quotation marks, yes.

Q. Well, now let us see—

A. They are practically all in quotation marks.

Q. O. K.

Now, the part that is not in quotation marks—well, the whole paragraph is this—

Mr. MacIntyre: Now, I object.

Trial Examiner Norwood: Now, wait a minute.

You may read and question him on the part that he says he is the author of.

By Mr. Stewart:

Q. Well, I will read the part, Doctor, that you are the author of. You read it into the record so that I don't get anything in by the back door.

A. The following words are mine:

"According to the Federal Trade Commission, the."

Continuing, "of the basing point system is."

Continuing, "and."

That is all.

Q. All right.

Now, the rest of the language, however, that is in that paragraph, and which is necessary in order to understand it, you took out of what you thought were official documents of the Federal Trade Commission, didn't you, and

6494 made that statement?

A. I would have to look at the reference here.

Q. All right, you look at the reference.

Trial Examiner Norwood: Now, in those quotations there, did you make them your own in that statement?

The Witness: Did I?

Trial Examiner Norwood: Yes.

The Witness: No. They are in quotation marks.

Trial Examiner Norwood: Yes, I know, but—

Mr. Stewart: Certainly he took them. It is obvious.

The Witness: I do not accept responsibility for any statement that I put in quotation marks. I only accept responsibility for a significant statement which I saw fit to quote.

By Mr. Stewart:

Q. That is what I am asking you. You saw fit to quote a significant statement of the Federal Trade Commission. Now, I want to know what that statement was, and did that not involve an interpretation by you of the document upon which you based your statement.

A. There is no interpretation. It is a direct quotation. Quotation marks are here.

Q. All right, it is a direct quotation. Where did you get it?

A. From the source given here.

6495 Q. All right, give it as of record.

A. The soure is "Hearings before the Temporary National Economic Committee, Part 19, Page 2199."

Q. All right. Any other references?

A. Not to that statement.

Q. Now, what I am asking you is this:

You say that what you state there as being the position of the Federal Trade Commission on the basing-point system is found in those documents to which reference is made in the footnotes of your article; is that right?

A. That is correct, unless I made some mistake in citing the reference.

Q. All right.

All I want to know is, you say the Federal Trade Commission has taken that position as to the basing-point system. Is that right?

A. As stated in their own words.

Q. In their own words.

A. As quoted there.

Q. All right.

BLEED THROUGH – POOR COPY

Mr. Stewart: Now, in view of that statement of the witness, Mr. Examiner, I want to read the entire paragraph for the purpose of showing that the witness' attitude toward the whole basing-point problem is such—

Mr. MacIntyre: Now, if Your Honor please, if that
6496 statement goes in—

Trial Examiner Norwood: Wait a minute. Let him complete the statement.

Have you completed your statement?

Mr. Stewart: No, I have not.

Mr. MacIntyre: All right, let him complete it.

Trial Examiner Norwood: Complete it.

Mr. Stewart (Continuing.): —the witness' attitude toward the basing-point problem, about which he is testifying is such that it would be impossible to obtain a fair and unbiased opinion on the subject.

Mr. MacIntyre: I most certainly object to—

Trial Examiner Norwood: Read the last statement.

(Mr. Stewart's statement was read.)

Mr. MacIntyre: I think that that is an improper statement for the record.

Mr. Stewart: Why? I want—

Mr. MacIntyre: And I object to the offer to read what Mr. Stewart has just stated.

Trial Examiner Norwood: I want to ask the witness a question here.

The Witness: Yes, sir.

Trial Examiner Norwood: Does that paragraph which you examined, and which contains quotations from the Federal Trade Commission, contain your opinion on the subject?

6497 The Witness: No. I formed my own opinion.

Trial Examiner Norwood: Those things which you quoted, did you quote them with approval—

The Witness: I can't tell unless—

Trial Examiner Norwood: as your opinion?

The Witness: I quote a good many things there, some with approval and some without. I would have to check it. You see, there is some information there from a lot of sources, one of which is the Federal Trade Commission. Now, my opinion was based upon the entire set of sources we used, some of which went way beyond the Federal Trade Commission studies, made by entirely independent organi-

zations, authors. We used all of them in arriving at that conclusion, whatever it is.

Trial Examiner Norwood: I don't see how that belongs in the record or in evidence in any way whatsoever.

Mr. Stewart: Well, I am going to—

Trial Examiner Norwood: Cite it in the record and you may read it to the Commission.

Mr. Stewart: Yes. In other words—

Trial Examiner Norwood: It is page so and so.

Mr. Stewart: In other words, without reading it in physically, it is understood that if the matter be material, I should be entitled to refer to the Commission the language
6498 beginning on page 151, "According to the Federal Trade Commission," and ending with the language "is a negation and frustration of price competition."

Trial Examiner Norwood: Yes.

Mr. MacIntyre: If Your Honor please—

Trial Examiner Norwood: And you are offering that as giving the attitude of this witness toward the subject?

Mr. Stewart: That it makes it impossible to obtain an unbiased opinion, he being offered here as an expert.

Trial Examiner Norwood: Well, I shall sustain the objection to the reading.

Mr. MacIntyre: What is the ruling as to the understanding that Mr. Stewart asked you about, and you said that he may read it to the Commission?

Mr. Austin: If Your Honor please—

Mr. MacIntyre: If there is any understanding of that kind, then I want the understanding to extend so as to include an opportunity on my part to show what in its entirety this monograph, with which this witness was identified, shows as to his position on the matter, and those portions which Mr. Stewart has read as going to the Commission's position be disclosed as to the Commission's entire position as shown in monograph 42, including the replies to letters to Mr. Grace, of the Bethelehem Steel Company.

Mr. Stewart: That is, of course, so silly I suppose the
6499 week has been a little hard and the gentleman is a little weary in his mentality.

But the whole point of my offering that is not to show what the Federal Trade Commission said, because I assume that the Federal Trade Commission has not closed the door to us, that we are going to have a fair hearing

BLEED THROUGH – POOR COPY

from the Federal Trade Commission, despite the fact that this witness said in this article that—he has made statements which would indicate the contrary; but what I want to know is that by his irresponsible statement that his attitude, in part—his attitude is such that it is impossible to get a fair and unbiased opinion.

The Witness: May I make a statement?

Trial Examiner Norwood: No.

You may show that if you have any evidence to show it.

Mr. Stewart: That is right.

Trial Examiner Norwood: But the quotation you were proposing to read there merely quotes from the Federal Trade Commission. Now, I have said that you are privileged to cite that, and also Mr. MacIntyre is privileged to cite the rest of it, and it is in the breast of the Commission as to whether it would hear any of it.

Mr. Stewart: Now, I want you to understand that what I am arguing is that that is not a correct statement of the position of the Commission—

6500 Trial Examiner Norwood: Yes.

Mr. Stewart: —you see. That is the witness' interpretation of documents. And I say that from that it is a fair inference that, if you make statements as reckless as that, that you can't place too much faith in his testimony. That is what I am trying to show.

Trial Examiner Norwood: Now, you have just asked this witness what statement he made with respect to the Commission's attitude, and I let him answer that. Now, if he has written anything that controverts that, why, I shall receive it in evidence.

Go ahead.

Mr. Austin: If Your Honor please, may I note that Mr. MacIntyre has requested the privilege of reading other things before the Commission from you. It is my understanding that if Mr. MacIntyre wants to he can read Mother Goose rhymes to the Commission. He doesn't have to have anybody's permission to do that.

Trial Examiner Norwood: That is implied and included in my statement.

Mr. Austin: I agree with you.

Mr. MacIntyre: Well, I did not know the necessity of Mr. Stewart's request in that direction. I just wanted to be as protected as Mr. Stewart.

Trial Examiner Norwood: Off the record.

6501 (Discussion off the record.)

Trial Examiner Norwood: Proceed with the examination, gentlemen.

By Mr. Stewart:

Q. I ask you whether or not you concur in this statement:

"Where firms agree upon a common basing point,"—

Mr. MacIntyre: No.

Mr. Stewart: Well, listen, if I were reading this from the Cosmopolitan Magazine, it wouldn't make any difference. I am just asking him if he agrees with the statement. You did that with regularity.

Trial Examiner Norwood: He can do that. He does not indicate where it is coming from.

Mr. Stewart: No.

Trial Examiner Norwood: Proceed.

By Mr. Stewart:

Q. I am asking you if you agree with this statement: "Where firms agree upon a common basing point, each one, foregoing the competitive advantage inherent in its location, makes its delivery charge so high as to enable every other one, however distant, to sell in territory that would otherwise belong to it alone. Without collusion, no such practice could obtain."

Do you agree with that point of view?

A. No. I do not recall that statement as being

6502 mine at all.

Q. No, I did not ask you that.

A. Well, I was going to say I would not support it in that form. Possibly if you qualify it, yes.

Q. Do you concur in this statement:

"In itself, of course, the basing-point method of quoting prices need not involve price uniformity."

A. No, I would not agree with that. I did not write that.

Q. You are not the author of that statement?

A. Not so far as I recall, no.

Q. This document, which contains some of the statements—or, rather, the statements which you have acknowledged in whole or in part as your own, and statements to which you have in part subscribed, involve the

BLEED THROUGH – POOR COPY

investigation by the Temporary National Economic Committee of the basing-point problem in what year?

A. I did my work on that in the—during the summer of 1940.

Q. 1940?

A. I would have to check the date, but that is my best recollection.

Q. Of course, I can't tell you when this was actually published. It shows it was published in 1940.

A. Well, I did my work in the summer of 1940; correct.

Mr. Stewart: I am through, sir.

Trial Examiner Norwood: Any further questions?

6503 Mr. Robison: I would like to ask some further questions.

Trial Examiner Norwood: Proceed.

By Mr. Robison:

Q. Dr. Loucks, I would like to ask you some questions for the purpose of making clearer to me than it is now your conception of a market as you have presented it here.

You referred to it as a market place or center. Are we to understand from that that a place is a necessary element of a market, as you contemplate it?

A. It is a necessary, but not the most essential, element of a market.

Q. I did not ask you if it is the most essential; I asked you if it is a necessary element.

A. Every transaction must take place somewhere. In that sense there must be a place involved. That is correct.

Q. Well, now, are there any limitations as to the size of this place which constitutes your market?

A. Yes. The fact that the word "center" is used in those synonymous terms, "market place" and "market center" indicates that there must be a center. And it can't be something that is dispersed. There has to be some center in force in the market concept as I have used it.

Q. Well, what are the geographical limitations of the market center, as you have used the term?

6504 A. I don't think they could be described in the abstract. They might vary from industry to industry, I should think.

Q. Well, is it conceivable that in some industry the whole City of Greater New York might be the center of the market?

A. Well, I should think that that might be a possibility under some conditions, yes.

Q. And is it possible that the whole State of New York might be the center of the market?

A. No. I think when you go to that extent in spreading the thing out, that you are getting away from any probability. The center of a market would not extend over quite that wide a territory.

Q. Well—

A. As I would use the term.

Q. Well, as I understand you, we have the fact that the whole City of Greater New York might be a market center in some industry, but the whole State of New York could not be. Now, where between those two geographical limitations would you draw the line beyond which geographical territory could not be considered as included in the market center?

A. Oh, I couldn't draw the line. It is a matter of degree. We have gone probably from one extreme to the other in those two, New York City and New York State.

Q. Well, suppose we take, in addition to the counties constituting the City of Greater New York, the four
6505 adjacent counties to the north in the State of New York. Now, would you say that that area might be the market center?

A. It is very much less likely to be than that New York would be. It is a matter of degree. You are getting away from one place and spreading it out to a wider and wider territory. I couldn't draw any line for you.

Q. Well, now, as I recall your testimony, you said that this market center was a place where buyers and sellers could meet, or had the opportunity to meet—I have forgotten your exact expression—either in person or through representatives.

Well, assuming, now, that the City of New York is your market center, what is your conception of the meeting of buyers and sellers in that center? Where do they meet, as you conceive it?

A. They do not have to meet in the physical sense, of course. By "meeting" I meant dealing with each other closely in such close contact that buyers and sellers each would have information about the other side of the situation. No physical contact. I did not mean that.

Q. And in your conception of a market, is it necessary that sellers, for example, not only have information about

BLEED THROUGH – POOR COPY

the other side,—by which I assume you mean the buyer's side,—but that they also have full information regarding the seller's side?

A. Not full information, no. I was not describing
6506 a perfect market. In a completely perfect market that would be true, but no market is really a perfect market. And in a perfect market there would be a lot of information, but certainly not complete information about every last detail of every other seller.

Q. Well, let me put it this way:

Is it included in your conception of a market not only that the buyers have all the information which is available in that market concerning the seller's side of the market, but that also the sellers in that market should have that same information?

A. That each side should have as much information as it can pick up—

Q. Yes.

A. —in this interplay or interchange.

Q. As much information as either side can pick up of both sides of the market; is that correct?

A. Under these conditions I have described. You have not described the market entirely. You just set one condition there, that buyers and sellers meet. Now, I have put in other conditions in my definition of "market". You are not taking all my description there, which included many more things.

Q. That is perfectly true. I am asking you now about the one element of your description of a market, namely—and I think I can refer to your own language—I am
6507 quoting from the record on page 6326: "Where there is a good deal of information floating around about supply and demand."

A. Yes.

Q. And it is an element of your conception of a market.

A. One element.

Q. Yes. That is what I am talking about. It is an element of your conception of such a market that both buyers and sellers should have, or have the opportunity to get, all this information that is floating around.

A. I did not use the word "all"; I used the words "a good deal". I object to using the word "all". I would not use it myself.

Q. It seems to me we are just quibbling, Dr. Loucks.

A. I don't think so.

Q. I don't want to quibble with you—
A. Well, let us use—
Q. —and I ask you not to quibble with me.
Mr. MacIntyre: Then, I ask that counsel not quibble with the witness.
Trial Examiner Norwood: You ask the questions and leave the comment off, and I will ask the witness to do the same thing. We will get along faster.

By Mr. Robison:

Q. Now, Dr. Loucks, you understood, did you not, that I was referring to something quoted from your testimony?
6508 A. Yes, sir.
Q. And I quote again:
"Where there is a good deal of information floating around about supply and demand."
A. Yes, sir.
Q. You understood that?
A. Yes, sir.
Q. And didn't you understand that when I then referred to all the information that was floating around I referred to what you had mentioned as a good deal of information floating around? Wasn't that clear to you from my question?
A. Well, of course, if you mean by "all" what is floating around, then the terms are synonymous, yes. I did not quite understand, I admit.
Q. Yes.
A. If you are using the terms synonymously, I agree.
Q. Yes.
Well, now, is it conceivable that this market center might be located in a single building?
A. In a given industry under certain conditions I can conceive of that being the market center; yes, sir.
Q. And in that case you would expect the buyers and sellers or their respective representatives, to gather in that center for the purpose of trading, would you?
A. In certain cases, such as the Stock Exchange, yes.
6509 Q. Well, is that sort of a conception of a market, that is, one located in a building, confined to such a business activity as that of the Stock Exchange?
A. All those that I know about are confined to the organized markets. I am not saying that that is all there

BLEED THROUGH – POOR COPY

are. I am saying that those are the ones that come to my mind.

Q. All right.

Now, let us assume, then, that the market for the product—we will confine it to one product of a given industry—is—when I say "the market" I mean the market center—is in one building. That can be assumed, can it not?

A. Yes, if you care to.

Q. Let us assume that the buyers and sellers do gather there for the purpose of trading.

Now, assume further that seller A and seller B and seller C gather in this market and with buyer M and buyer N and buyer O gather together in a group, and seller A says, in the hearing of the group, "I just discovered this morning that seller D has laid off about half of his force in his factory, and I hear that seller E has done the same thing. Also I learned this morning that buyer P here bought a carload of our commodity at an increase of 5 percent over the last sale, and I hear that P is expanding his warehouses, stocking his product."

Then assume that still another buyer comes into
6510 the group—we will call him R—and he touches seller A on the shoulder and asks him to step aside, and he says, "I want to buy a carload of this commodity from you in the amount of the last sale plus a 5 percent mark-up."

A says to him, "That is not my price. I won't sell at that price. I will sell you at still another 5 percent mark-up."

And so the buyer goes to B, and he has the same experience. B says he would not sell him at the amount of the last sale; that his price is 5 percent higher. Buyer B goes to C, and goes through the same process.

Will you say under those circumstances that there was any tacit acceptance by sellers A, B, and C of a market condition which had resulted in their demand of an increased price over the last sale?

A. Adhering strictly to the conditions that you specified, I can't see in the description that you gave any indication that there was any such agreement, active or passive.

Q. And on that state of facts you would not call what A, B, and C each did a passive acceptance, in the sense

that you have used the term "passive acceptance" regarding the following of the basing-point method?

A. When A, B, and C refused to sell, you mean, at the buyer's offer?

Q. At the amount of the last sale, at the amount
6511 of the buyer's offer, I said. Each of them, within a period of a very few minutes, said, "No. My price is 5 percent up from that last sale." You would not call that a case of passive acceptance of what the other was doing?

Mr. MacIntyre: Now, I object to the question as put in that it is attempting to incorporate into this question, which includes in it the element of the basing-point system, testimony of the witness to a prior question that did not include the element of the basing-point system used.

Trial Examiner Norwood: The objection is overruled. Answer the question.

A. Assuming that each was perfectly free to value this information which he picked up when he stood around there as to whatever he thought it was worth, assuming each was not in any way interested in what the other party did, assuming they acted independently in refusing to accept this buyer's offer, I see no tacit acceptance of an agreement. He simply did not like the price that the buyer offered him. Five minutes later he might have taken it. He might change his mind.

By Mr. Robison:

Q. Yes.

A. Two minutes later. Thirty seconds later.

Q. Now, having that answer in mind, and having in mind also the question that was asked you yesterday about one producer in an industry adopting solely on his
6512 own initiative and in what he conceives to be his own best interest the basing-point method of selling his product, and then a second producer starting up in the industry, perhaps far removed from the location of production of the first one, and selling wherever he could on the same basis that this first producer was selling, as I understood you yesterday you said you would look upon that as a tacit acceptance by this second producer of what the first producer was doing.

A. That is correct.

Q. And then I think you said further that if three or four others came into the industry as producers and they

sold wherever they could sell on the same basis on which they found the commodity then being sold, that you would look upon that also as a tacit acceptance—

A. That is correct.

Q. —of an existing condition.

A. Yes, sir.

Q. And you said that you would infer from that that there was an understanding which carried with it certain obligations. Am I right in that?

A. Either an active or passive tacit understanding.

Q. And you would infer from that, that that tacit understanding carried with it certain obligations on the part of each of those; is that right?

A. That is correct. Not necessarily in writing.

6513 Q. No, not in writing.

A. That is correct.

Q. All right.

Now, how do you distinguish between the actions of sellers A, B, and C in my assumed question and the actions of these producers, whom we have not lettered but whom we have in mind? How do you distinguish in that respect and in the matter of inferences that you think that you should draw from that tacit understanding, as you have indicated here?

A. I think the distinction is very clear. In the first case that you cited, I found no evidence whatsoever of any assumption of any obligation by any seller to any other seller to do anything. There was no way in the first case that you cited, so far as I can see, in which any one of the sellers could in any way penalize any other seller for anything that he decided to do or not to do. There was no mutuality in the sense of an acceptance of mutual responsibilities or obligations. There was no mutuality in the sense that anyone could enforce upon any other party, by any threat or intimidation or fear of what might happen to him if he did not do thus and so. There was none of that in your first case, so far as I could find.

In the second case, all of those things were present. There was an acceptance of a mutuality. There was apparently an acceptance of having—permitting the

6514 other man to do certain things if I may do certain things. There was very clearly established the possibility that if you did not continue these obligations one of the others could do something that would force you pos-

sibly to change your mind and do it. There was a very great possibility of mutuality, such as I have used in the second case, but not in the first.

Trial Examiner Norwood: We will have a five minutes' recess.

(There was a short recess taken.)

Trial Examiner Norwood: Go ahead.

By Mr. Robison:

Q. Dr. Loucks, I am referring now to the last answer you made before this short recess. I want to ask you where you found in the assumptions presented to you regarding these unlettered manufacturers—you know the ones to whom I refer? That is, the one who started—

A. The last set?

Q. Who started—

A. That is right.

Q. —the one who started in the industry.

A. That is clear.

Q. —used the system and the second who came in used the system?

A. Yes, that is correct.

Q. I will call that the unlettered manufacturer.

6515 A. Right.

Q. Where did you find in the assumptions presented to you yesterday regarding these unlettered manufacturers the fact that you have brought into your last answer, that there was an understanding between them that they mutually adopted obligations and there were means of enforcing the performance of those obligations? From what source did you derive those facts that you brought into your answer?

A. Well, I was picturing the system in operation as a system basing it on a description of how each producer quoted—arrived at his quoted prices and testified yesterday to what I considered to be a fact, that mutual dumping is inherent in the system as it would work, the only way in which it could work, and that if you become a member of the system, I mean if you accept these tacit understandings going into the system that you accept mutual dumping.

Q. Well, in the case of the first two unlettered manufacturers, where did you find in the assumptions presented to you any element of understanding between those first two?

Mr. MacIntyre: I object to the question in that we are

BLEED THROUGH – POOR COPY

getting now into a situation where we are referring not to some hypothetical lettered manufacturers that were discussed in some argument yesterday, but we are forgetting letters and going into unlettered manufacturers, and I cannot follow the question. I, therefore, don't know what
6516 it is all about, and I am absolutely helpless in protecting the record for its clarify on it.

Trial Examiner Norwood: Do you understand what he is referring to, the two hypotheses that he is contrasting here?

The Witness: Yes, I think I do.

Trial Examiner Norwood: In your unlettered manufacturers, are you referring to hypothetical statement A?

Mr. Robison: Oh, no, no. These hypotheses that have been developed here have no reference whatever to hypothetical question A.

Mr. MacIntyre: I submit that the assumption should be restated so we know what we are talking about.

Trial Examiner Norwood: Well, I think the counsel may do that. I should like to have it.

Mr. Robison: I will be very glad to, and in doing it I will try to elevate these unlettered manufacturers that I have referred to to the lettered class.

Mr. MacIntyre: Well, I ask that the question be made complete at this time so we know precisely what class that these elevations go to.

Trial Examiner Norwood: Well, now, I don't think that the matter has to be clarified in just the way that the counsel is suggesting here, but I promise him that it will be clarified, and for the time being I am going to over-
6517 rule the objection and ask the witness to answer the question.

Go ahead.

By Mr. Robison:

Q. Do you recall, Doctor—

Trial Examiner Norwood: He has not answered it yet.

Mr. Robison: Oh, I beg your pardon. I thought you were asking me to frame a new question.

Trial Examiner Norwood: No.

Mr. Robison: I am sorry.

The Witness: May I have the last question?

Trial Examiner Norwood: Read his question now.

(Question read.)

A. If the first two accept all the practice of quoting their prices on the basing-point method, in merely doing that they have come to this tacit understanding or acceptance of mutual obligation, responsibility, that I have referred to.

Trial Examiner Norwood: We want you to point out the conditions in the first hypothesis that were not present in the second, and upon which you based your distinction between the two.

Mr. Robison: Well, I think that is not quite the question at the present time. I think we did that some questions back. At least I asked him such a question some questions back, and it developed into an explanation by the witness of what he had undertaken to say in answer
6518 to a hypothetical question yesterday. There at that time we were comparing one set of hypotheses which had reference to a market and a building with another set of hypotheses, but that is not the present question. The present question—

Trial Examiner Norwood: Go ahead.

Read the question again.

(Question re-read.)

Trial Examiner Norwood: Have you completed your answer?

The Witness: Well, I think I have answered that not only this time, but I—in direct testimony and several times on cross-examination.

Trial Examiner Norwood: All right.

The Witness: I would be glad to go into it again if you would like.

Trial Examiner Norwood: Never mind.

By Mr. Robison:

Q. Well, in connection with your last answer previous to what you have just now said, do you have in mind that the only fact regarding the method of selling of the second manufacturer that was presented to you in the assumptions that you were asked and had in mind was that on starting up in the industry referred to he sold whatever he did sell at the same price that he found the first unlettered manufacturer was charging at those respective points?
6519 I say, do you have in mind that that was the only set of facts regarding the second manufacturer's method of selling that was presented to you in the assumptions?

BLEED THROUGH – POOR COPY

Mr. MacIntyre: I object to the question.
Trial Examiner Norwood: Overruled.
Answer the question.
Mr. MacIntyre: It is not clear.
A. Well, yes, that is what I was basing my answer on.

By Mr. Robison:

Q. That is, you were basing your answer solely on the assumptions that you were asked to make in the question asked of you?

A. Yes, as far as I could understand them, I was.

Q. And yet from that fact alone included in the assumptions presented concerning the method of selling adopted by the second manufacturer, you found to your entire satisfaction, did you, evidence of understanding on his part with the first unlettered manufacturer of the undertaking by him of an obligation to the first unlettered manufacturer, the undertaking by the first unlettered manufacturer of an obligation to the second one? You found all of those things to your satisfaction in that statement of assumed facts; did you?

A. Yes, because both of them accepted a system of mutual dumping. I will be glad to describe that in more detail.

Q. No, I think you have already described it—

6520 A. That is inherent in the—

Q. —on your direct examination?

A. That is right.

Q. Well, there was nothing in the assumed facts that were presented to you which showed over what geographical territory the second unlettered manufacturer sold; was there?

A. It would not make any difference, if there was no absolute wall between them.

Q. Well, don't you recognize what has sometimes been referred to in the course of this proceeding as the advantage territory of one manufacturer?

A. But that is done away with by your basing-point system, by quoting the prices in the way your assumption held them to be quoted. That is the very essence of the whole thing.

Q. Well, let us analyze that a little. Assume that—

Mr. MacIntyre: Just a moment. I object to Mr. Robison's analysis of any situation and contend that if he wants

anything further from this witness in the form of testimony he should put questions and not engage in arguments and analyses.

Trial Examiner Norwood: I think that these counsel have had their cross-examination here, and I will ask them to complete this feature of it in two or three questions.

Mr. Robison: It is my desire and intention to complete the line as expeditiously as I can.

6521 Trial Examiner Norwood: Well, your firm has had its cross-examination of this witness, and I permitted you to ask a few questions there, but I don't think it should be continued.

Mr. Robison: Well, I assume—

Trial Examiner Norwood: Your firm has had its cross-examination and then Mr. Stewart has cross-examined.

Go ahead.

Mr. Robison: I understand that you indicate that you propose to stop me at some point. I am loath to proceed against your wishes in the matter. At the same time I feel that I have certain obligations to perform if I am permitted to perform them.

Trial Examiner Norwood: Go ahead.

Mr. Robison: I think there is an unanswered question, is there not, Mr. Reporter?

(Record read as follows:

"Q. Well, let us analyze that a little. Assume that—")

By Mr. Robison:

Q. Assume, in addition to the assumptions presented to you regarding this first and second unlettered manufacturer, that the second of them does not sell beyond the limits of the territory which you would consider to be his advantage territory if he were selling on an f.o.b. mill basis.

6522 A. I can't assume that and keep your other assumptions. They are inconsistent.

Q. What other assumptions—

A. Your assumption that he is quoting a system—a price with the basing-point method. I cannot assume that and then assume an f.o.b. situation. It is impossible. I am very sorry; I just can't do it.

Q. Well, when the fact was presented to you by way of assumption that this second unlettered manufacturer sold at the same price, wherever he sold, at which he found the

first of them selling, that indicated to you the adoption of a system; did it?

A. Well, it was—it is one of the—it is the result, the identical price quotation result follows from the basing-point method of calculating your prices, yes.

Q. Well, let me interject, as an economist, you consider yourself a scientist; do you not?

A. (Laughter)

Q. Well, if you can't answer it "yes" or "no," I will withdraw it.

A. (Laughter) Well, I am not refusing to answer it. I don't want the record to show that. I will be glad to answer it.

I do consider myself a social scientist; yes, sir.

Q. Now, as a scientist, do you consider that the fact and the mere fact that this second unlettered manu-
6523 facturer sold in different localities where he did sell at the same price that he found to be the going price there, or existing price there, that that warranted you in concluding that he was acting as a member of a system?

A. It isn't the selling. It is the quoting of the price that I am looking to.

Q. All right. Then substitute the word "quote" for my word "selling" in my last question, and tell me whether you as a scientist consider that that fact alone justified you in concluding and expressing the opinion that this second unlettered manufacturer had become a member of a system with all the implications that that carries with it such as we have outlined in recent questions?

A. My answer to that is "no," that I was taking that fact together with the other assumed facts that were in the other questions there which I assumed were continuing through, as I think the questioner said was merely an additional factor that I should take into consideration.

Q. Well, then, if, as an examination of the record may show, the question presented to you did not include any assumptions outside of the immediate question and more specifically did not include any assumptions that were included in the statement of facts for hypothetical question A, or in Mr. MacIntyre's hypothesis No. 1, then your an-
swer to the question which was then asked you would
6524 have been different; would it?

A. I am confused now. I have lost my place in the story. I will have to have the conditions set up again. We

have been shifting back and forth from one set of assumptions to another, and I am just lost.

Q. Well, I think that would be quite simple.

Now, please put out of your mind for the purposes of my present question anything that you were asked to assume in what has been referred to as hypothetical A—

A. Yes, sir.

Q. —and anything that you have been asked to assume in what has been referred to as hypothesis No. 1.

A. Yes, sir.

Q. Assume that, first, there is only one manufacturer in a particular industry, and that he, over a period of several years, has been selling his product on the basis of delivered prices only, the delivered prices being computed from a price at some one point. Consider that a second manufacturer engages in that industry and locates his plant at a very considerable distance from the plant of the first one—maybe a third or a half of the way across the continent—assume that—now, we will, in order to avoid confusion, say that the first manufacturer will be referred to as "X" and the second as "Y." Now, assume that manufacturer Y, when he goes into this industry, finds manufacturer X selling in the territory immediately surrounding his
6525 locality at certain prices which are determined in the way I have indicated, and assume that manufacturer Y then sells in those same localities, in so far as he cares to reach out from his point of production to sell, at the same price at which manufacturer X is selling in those places.

Now, on that state of facts and that state of facts alone, would you find all these evils of a system and of understanding between X and Y and of obligation undertaken on the part of Y toward X and an obligation undertaken on the part of X toward Y that you have referred to in previous answers to a similar set of assumptions?

A. As a mere economist, I do not pretend to pass upon matters of good or evil. In this particular situation there could nothing else result but a system of mutual dumping, which would involve certain obligations and responsibilities, tacitly accepted if in no other way, by both the parties, and the result would be just the same result that I have described time and again. I cannot see how any other result would follow, but I do not declare that evil. I am merely saying it is not what I would consider effective competi-

BLEED THROUGH – POOR COPY

tion, I don't care whether it is good, bad, or indifferent. I am not talking in terms of ethical concepts.

Q. Well, I think we have cleared the situation to some extent.

6526 Now, will you tell me what you mean by "effective competition"?

A. I have defined that in my direct examination, Mr. Examiner. Could we have the definition read?

Trial Examiner Norwood: He has defined that more than once.

Q. Well, let me ask you this: Is your conception of effective competition bound up with your conception of a market, as you have described it?

A. To have effective competition you have to have an effective market, yes. If you have a market which is very ineffective removed by a very substantial degree from a perfect market you will also not have effective competition. The two are related. I can go into more detail in comparing the concepts and setting them over against the other, but I think that probably is the essence of it.

Q. Well, when you speak of an effective market, do you refer to this kind of market that you have described as a place where buyers and sellers meet, and where there is a large amount of information floating around, and all those other elements?

A. I did not refer to the term "effective market." It is a term I haven't used.

Q. I beg your pardon.

Mr. Robison: May we have the previous answer

6527 read, Mr. Examiner, to see whether he did not?

Trial Examiner Norwood: You mean—

Mr. Robison: Well, unless my—

Trial Examiner Norwood: You mean immediately—

Mr. Robison: Yes, the second last answer.

Trial Examiner Norwood: Yes, you may read that.

Mr. Robison: Because, unless my ears deceive me, the witness did use the term "effective market."

Trial Examiner Norwood: Read the previous answer.

The Witness: If I did, it was a slip of the tongue. I don't think it is there.

(Record read as follows:

"A. To have effective competition you have to have an effective market, yes."

Mr. Robison: That is sufficiently far for my purposes.

The Witness: I beg your pardon. It was a slip of the tongue. I meant to have effective competition you have to have a market which does not depart from a—what I have defined as a pure market by very much. It has to be up toward—with the characteristics that I have defined as those of a perfect market. It has to have those in a very substantial degree. I beg your pardon. I was entirely wrong. It was a slip of the tongue.

By Mr. Robison:

6528 Q. In order that I may get a picture of such a market as you refer to, can you indicate to me a market for any manufactured commodity in this country which fits your conception of a market, as you have indicated it?

A. Oh, yes, I think so.

Q. Well, will you tell me one?

A. Well, to start with, one that is one of the best known, you have your securities markets.

Q. I asked for—

A. Oh, pardon me. Manufactured—

Q. I said the market for a manufactured commodity.

A. Yes, that is my mistake. Well, I should say in the textile field, particularly cotton textiles, the rougher forms of cotton textiles, there are markets that come within my meaning of a market, not a perfect market, but something slightly removed from a perfect market, a market so perfect, or so nearly perfect, that you could have plenty of effective competition prevailing therein. That would be one. I think in the woolen and worsted industries you have about the same thing. I think in automobile tires you have about such a situation. I think in food products you have it, and I think there are others. Those illustrations are possibly enough.

Q. Referring now to the market or markets for cotton textiles to which you have referred, where are they located?

A. I would have to rely now upon some descriptive material that I haven't gone over for quite a while,
6529 but it is my best recollection that there is a very active market for certain forms of cotton textiles, the rougher forms, in New York City, a very competitive market, I think.

Q. Do you know of others?

BLEED THROUGH – POOR COPY

A. I beg your pardon?

Q. Do you know of others in this country?

A. You mean in cotton textiles?

Q. Yes.

A. No; I have seen and read a good deal about that particular one, and I was just citing that as an illustration of what I meant. I don't know—

Q. Well, I am not attempting now to confine you to your own individual knowledge. I don't care whether you have seen each of these markets or not.

A. No.

Q. But from your general information, do you know of others in the cotton textiles?

A. Others in the cotton textiles, no, I can't say that I know of any others. I could speculate on where I might expect to find some if I went to look for them.

Q. I am afraid that would not help us any.

A. I would be glad to do that and you can check my speculation with the facts.

Q. No; I am afraid that would not be of any assistance.

6530 A. All right.

Q. Do you apply to such a market as you have now indicated, or of which you say the cotton textile market is an example—do you apply some descriptive term other than "market" to that? I refer to the fact that in the course of your testimony you have used the term "a pure market"—or not "pure"; "a true market." Now, is there any sort of a descriptive term, more or less similar to that perhaps, that you would apply to "market" of which the cotton textile market is an illustration?

A. Well, I suppose that the term "effective market" would not be very far off. I hate to use the word "effective market" and "effective competition." It looks like a little confusion. I don't think there is any difficulty.

Q. Particularly after repudiating the term "effective market" a few minutes ago?

A. That is correct. I was mistaken on that point, and I beg your pardon a thousand times.

Q. No apologies necessary.

A. No, I beg your pardon on that. I should have waited until the question was read.

Q. Well, what I would like to know is whether this sort of market of which you have given the cotton textile mar-

ket as an illustration and to which I think, according to my understanding, you have referred as a true market,
6531 whether that is the only sort of market that is recognized by economists to be—if I may use the language that a dog fancier might use, if we consider the cotton textile market as a pedigreed market, is there such a thing as a mongrel market that economists recognize when they consider what is actually done in the conduct of business?

A. Well, there are all sorts of degrees of imperfections of markets that would be recognized, and with a given set of facts almost anyone in the field of economics could give some opinion as to the degree by which that market is removed from a perfect market. There would be all sorts of variations, just as there are all sorts of variations of imperfect competition.

Q. From what you told me a moment ago I assume—and correct me if I am not right in my assumption,—that you would not undertake to say that one market as compared with another is good or is justifiable, or apply any other similar or opposite term, either one, to it?

A. Those are not economic terms. They are ethical concepts, and in the field of economics we like to confine ourselves to terms that we can define in rather objective terms.

Trial Examiner Norwood: Now, he has already explained that.

Q. Well, then, dropping that subject at the Examiner's suggestion, Dr. Loucks, I was not able to understand—
6532 probably it was my fault—what you included in the term "cost of production." One question that I have in mind concerning it at the moment is whether you include any element of profit or return on invested capital in your term "cost of production"?

A. There has to be some return on capital invested and needed in the industry in order to induce capital to continue to flow to that industry or even to induce it to retain there if it is possible to liquidate it. In that sense some return on capital, some remuneration to the parties who have put up the funds is an essential cost of production which must be covered by price by and large over a period of time. It does not mean that the price at every particular time has to cover cost in that sense, and it surely does not mean that price at any particular time has to cover some assumed or stated or anticipated rate of return on all in-

BLEED THROUGH – POOR COPY

vestment put into an industry, whether prudently or imprudently put there.

Q. Well, in your philosophy as an economist and in your conception of price, is there any place for profit to a seller in addition to this return on necessary capital investment that you have just referred to?

A. Well, I don't have any philosophy. I am merely trying to describe what happens.

Q. Well, if I have used the wrong term in that respect please overlook that particular defect in my question. You get the purport of my question; do you not?

6533 A. Well, I am not sure that I do. Could we have it read? I stuck on the word "philosophy." I did not hear anything after that.

(Question read.)

A. Economists almost always—I along with, I think, most of them—make a rather clear-cut distinction between a price determining return on investment and what we call pure profit. A price determining return on investment is some element which over a period of time must be covered by price in order to have an industry continue functioning to the extent that consumers want it to function to turn out goods for them. Pure profit—net profit sometimes is the term used in the field of economic theory—means something over and above that which at various times various concerns, various industries, do get which at other times they get under effectively competitive conditions in a negative sense, getting less than this cost on investment as a price determining factor I described a moment ago. Over a period of time, our assumption is, in economic theory—over a period of time, under conditions of effective competition, we assume—and we think it is warranted from a study of the data in various industries—that pure profit, as we use the term, under conditions of effective competition, is pretty well—pretty well disappears, not as a permanent realization by as an industry under conditions of effective competition; that where you find

6534 what we call a pure profit as a continuous thing, particularly if it is substantial, it is often that as a one element of suspicion that there is some degree of—some substantial degree of monopoly power being exercised over the market for that particular product.

That is about as well as I can do in the short time permitted.

Q. I think you have answered the question there.

Assume that one producer of a dozen producers in an industry, from perfectly natural causes of location or higher efficiency of operation or what not, had a cost of production which was 10 percent lower than that of any other producer in the industry. Under economic theory would that producer, being the lowest cost producer, be expected to derive a profit, as you have used the term, so long as he remained the low cost producer in that way?

A. If we are using the terms in the same way, there would be—

Trial Examiner Norwood: I will ask you to make your answers short and as direct as you can.

The Witness: I am afraid I can't answer that "yes" or "no."

Trial Examiner Norwood: Well, go ahead.

Q. Well, then, let us pass to something else.

Do you consider that self-interest on the part of
6535 both buyers and sellers is a necessary element of a market as you conceive it as an economist?

A. Yes, I think that is, in my definition, each acting independently in his own self-interest.

Q. And, as a matter of fact, is it not true that you expect sellers as between themselves to follow a hundred percent their own self-interest?

A. I would not expect them to act illegally or against any such thing as a law, no. There are limitations to that.

Q. I don't think we need to assume that they are going to commit crime in doing it, but, short of limiting it to that sort, you do expect them to consider first and foremost each his own self-interest, do you not?

A. Yes, I think so.

Mr. MacIntyre: I object to further questions along the line. It has been covered twice.

Trial Examiner Norwood: Objection sustained.

Mr. Robison: May I be informed as to where and when and by what witness it was covered twice?

Mr. MacIntyre: You will find questions of Mr. Gilpatric yesterday afternoon going to that line of questioning.

Trial Examiner Norwood: Now, I have stated heretofore that I think that counsel is imposing on the permis-
sion I gave him to ask a few questions when his cli-
6536 ents have already had a cross-examination, and I only think he is holding on here to have me stop him and to make a point.

Mr. Robison: No, I have no such thought in mind, Mr. Examiner, and I wish as emphatically as I can to disclaim any such thought or intention, and I am very sorry to find that you could even have that thought.

Trial Examiner Norwood: Well, go ahead.

Mr. Robison: But I do feel that there are further questions that I would like to ask and should be permitted to ask, and I do not wish to duplicate anything that has been asked of this witness before, but, in so far as my recollection goes, the term "following self-interest" has not been used in examination of this witness anywhere.

Trial Examiner Norwood: Well, I think the counsel should give these other Respondents a chance to cross-examine without delaying these proceedings too much.

Mr. Bozeman: If Your Honor please—

Trial Examiner Norwood: Go ahead. Ask any other question that you deem absolutely necessary.

By Mr. Robison:

Q. Well, Professor Loucks, referring further to this matter of self-interest on the part of sellers, does your economic theory assume that sellers will follow their own individual self-interest in their respective dealings with buyers as well as in their treatment in a market of other sellers?

6537 A. Yes, within those limits laid down by society.

Q. Yes. Well, then, is there any reason, as you conceive of the matter as an economist, why a seller should not charge as high a price as he can get in a market, still acting, to use your term, within the rules of organized society?

A. I am assuming that every seller charges the highest price he can get; that there are all kinds of markets in which he sells. It may be one type of market in which he sells and gets all he can get, or it may be another type of market, if you want to use the term "the effectively competitive market," in which he sells and gets all he can get, or it may be a market in which there are very few elements of competition in which he sells and gets all he can get. In any event, the seller gets all he can get; he sells at the highest price he can get, if that is what you mean.

Q. Well, you expect him to do so? You as an economist expect him to do so?

A. Yes, certainly.

Q. Now, when you were asked regarding a delivered

price—that is, a commodity sold at a delivered price—and you referred to it as a combined price, did you mean that that combined price was a price for one commodity or for two or more commodities?

A. By a combined price, I would, of course, mean two or more. The word "combined" itself implies that.

6538 Q. And you intended it to mean a price for at least two separate commodities; did you?

A. Well, they need not be commodities in the physical sense. It may be a commodity or service. I was using the term in its general sense.

Q. Yes.

A. Two separate things.

Q. Yes, I understood that an economist—

A. That is right.

Q. —includes service sold in the conception of a commodity as well as a physical commodity?

A. Well, oftentimes, yes.

Q. Yes. Well, now, using a commodity in that broad sense of the economists, did you mean that you considered a delivered price to be a price for two separate commodities?

A. Yes, assuming the delivery is a separate part of the transaction, that it could be physically separated from the fabrication of the commodity, that is what I meant.

Q. Well, just to make it clear, if a manufacturer of rigid conduit in Pittsburgh sells conduit at a delivered price in New York City, his price having been arranged with the buyer as so much delivered at New York City, you consider that he has sold that buyer two commodities; do you?

A. Yes, if the conduit could be carried by common carrier.

Q. Well, suppose, then he does not have it deliv-
6539 ered by a common carrier but ships it from Pittsburgh to New York in his own truck?

A. I said "could be delivered by a common carrier,"—

Q. Oh.

A. —"physically."

Q. It would not make any difference how he delivered it?

A. Oh, no, as long as it could be delivered by a common carrier.

Q. If it was something that was capable of delivery by a common carrier, then you would say that he was selling to the purchaser in New York City two commodities?

BLEED THROUGH – POOR COPY

A. That is correct.

Q. I think I have only one more question to ask, Dr. Loucks. It is this: Do you consider that any sales policy followed by a seller concerning which you would say that it indicates an absence of effective competition can result only from subversive influence on the part of more than one seller?

A. I can't answer that because the word "subversive" is not an economic term. It appears in no economic textbook that I have ever seen. I have never heard the term in economics. I can't answer. I am sorry.

Q. Well, speaking as, let me say, an educated man and not as an economist, you know the meaning of the term "subversive," do you not?

A. I am testifying as an economist, I am sorry,
6540 and I must answer all questions as an economic expert unless everyone agrees that I should become somebody else.

Mr. MacIntyre: I object to the question that is put unless we want to go into definitions of terms and a discussion of those terms that are outside of the field within which the witness has been tendered as an expert.

Trial Examiner Norwood: Read the question.

Mr. MacIntyre: And I also object to it as being irrelevant and immaterial to the issues.

Trial Examiner Norwood: Read the question.

(Question read.)

Trial Examiner Norwood: Then there was an objection there and the objection was sustained.

Proceed.

Mr. Robison: Well, I will only proceed, Mr. Examiner, to the extent of asking that I have an exception, and thereupon I will comply with your wishes that I cut short any further examination.

Trial Examiner Norwood: Any further cross-examination?

Mr. Austin: If Your Honor please,—may we go off the record a minute?

Trial Examiner Norwood: Yes.

(Discussion off the record.)

Trial Examiner Norwood: Is there any further
6541 cross?

Mr. Austin: No.

Trial Examiner Norwood: No further?

Redirect.

Redirect Examination by Mr. MacIntyre.

Q. Dr. Loucks, referring to the question which was asked you at line 5, page 6466 of the record, and the answer that you gave to it as appears on that page, I ask you whether you care to make any further explanation of that answer?

A. There are two questions. Do you mean the question at the top?

Q. The one that begins on line 5.

A. Oh, line 5.

Q. And the answer following that, the further questions that grew out of that answer, and the answers to those. If you care to give any further explanation to those questions and answers to clarify them, I would like to have them.

Mr. Robison: I don't think this is redirect examination, Mr. Examiner. I object to that.

Trial Examiner Norwood: Was that something that came out in cross?

Mr. MacIntyre: The last half a dozen questions that were asked this witness on cross-examination yesterday afternoon.

6542 Mr. Gilpatric: But he did not ask for any opportunity to explain at the time and I didn't cut him off.

Trial Examiner Norwood: Well, the redirect is the place to take those opportunities.

Mr. Robison: Well, but I had understood that redirect examination should be directed to specific statements which may have been made by the witness on direct with the view to ascertaining whether he wishes to either explain them further or qualify them. Now, this does not seem to be that sort of examination.

Mr. MacIntyre: If this does not fit that, I don't know what it would fit.

Trial Examiner Norwood: It seems to me to fit it. If it does not, I will entertain a motion to strike the answer.

Mr. Stewart: The question is whether he wants to explain it further. Of course, he has got to say he does or he does not.

Trial Examiner Norwood: Well, he may explain it if he has any further explanation.

Objection overruled.

BLEED THROUGH - POOR COPY

A. Yes, I think I would like to explain just very briefly. I testified here that:

"Imperfect or monopolistic competition, as I have been using the terms, include my term 'effective competi-
6543 tion,' • • • They overlap, which makes the question somewhat difficult."

I think the word "overlap" probably was confusing. I think all of my testimony as to these concepts has made effective competition appear to be a type of competition which approaches perfect competition by much greater degree than do some forms of imperfect and monopolistic competition so that you may have some practice, in the terminology that I was using, which could be called imperfect or monopolistic competition and yet would be so far removed from perfect competition that I would not be willing to include it at all in my term "effective competition."

I think that clears it up.

Q. And can you specify some of the forms that you would not so desire to include within your definition of "effective competition"?

Mr. Stewart: That is objected to as immaterial—

Trial Examiner Norwood: Sustained.

Mr. Stewart: —and not redirect.

Trial Examiner Norwood: Sustained.

Mr. MacIntyre: If Your Honor please, it is a part of the explanation of the answer that he gave on cross-examination as to his definition of "monopolistic competition."

Trial Examiner Norwood: Go ahead.

A. Yes, I would be glad to comment—

6544 Trial Examiner Norwood: Wait a minute.

The Witness: Oh, pardon me.

Trial Examiner Norwood: Objection sustained. Eliminate that answer.

Go ahead.

By Mr. MacIntyre:

Q. How can we tell from your answers whether or not when you refer to "effective competition" or "monopolistic competition" you are including in the latter effective competition?

Mr. Stewart: I object to that as having already been clearly explained.

Trial Examiner Norwood: Objection sustained.

Mr. MacIntyre: Your Honor please, that is a question

that Mr. Gilpatric asked this witness, and now I would like to get an answer from the witness on redirect.

Mr. Stewart: He has already explained it.

Trial Examiner Norwood: I think he has explained it.

By Mr. MacIntyre:

Q. On cross-examination you have told Mr. Robison about what is essential in the way of information among buyers and sellers in a market in order for it to be a true market, or whatever term was used there in connection with that discussion. Now, I am going to ask you whether or not you as an economist consider that it is essential for the sellers to inquire into or receive from each
6545 other or from others information concerning the plans or intentions of particular sellers as to what future prices the sellers are to quote in order to establish a market in which effective competition prevails?

A. Oh, no, that isn't what I meant.

Q. On cross-examination Mr. Robison asked you if economists recognized, using the term "pedigreed" in comparison with effective or a true market, that other markets possibly of a mongrel type exist. Will you, using those terms in the sense that they were used in your understanding of the question that was put to you by Mr. Robison, specify if you can for us some types of—that is, some methods which are used by industries in quoting prices and which do not fall within this term "pedigreed market"?

Mr. Stewart: Well, I object to that as not being redirect. It is of no moment.

Trial Examiner Norwood: Objection sustained.

Mr. MacIntyre: The "pedigreed" and "mongrel," then, on cross I don't believe could have been of any moment.

Mr. Stewart: I agree with you.

Trial Examiner Norwood: Off the record.

Mr. MacIntyre: But we used time on it this morning nevertheless.

Mr. Stewart: That is right.

Trial Examiner Norwood: Proceed.

6546 By Mr. MacIntyre:

Q. On cross-examination Mr. Stewart read to you a statement from page 150 of Monograph No. 21, Competition and Monopoly in American Industry, that is, entitled "Competition and Monopoly in American Industry," as published by the Temporary National Economic Commit-

BLEED THROUGH – POOR COPY

tee. I show you that statement which he read to you and ask you whether or not there is anything connected with it which you consider as necessary to explain the portion of it which he read to you?

Mr. Stewart: I object to that, first, for the reason that I did not designate that I was reading from anything. Your Honor will recall that was a question that arose. I simply put up a proposition to the witness in certain words. Now, it is of no moment as to whether this witness thinks there is something else in there that ought to be added on to explain what I asked the witness.

Trial Examiner Norwood: Now, is that statement in evidence?

Mr. MacIntyre: Mr. Stewart read that into the record as a statement coming from page 150 of this booklet, and had answers—

Trial Examiner Norwood: Now, this witness can make any further statement about that statement that is explanatory to it.

The Witness: Is it this one marked in pencil here?

6547 Mr. Stewart: I have no objection to that. What I am complaining about is that the question is, "Will you, Mr. Witness, look at the document and interpret it in such a way as to determine whether or not there is something more that ought to be added to explain what was asked you?"

Trial Examiner Norwood: Well, I will overrule that objection. Let him give us his reactions.

A. Yes.

By Mr. MacIntyre:

Q. I will say to you that it is the statement beginning in the last paragraph of the page I referred to.

A. Now, where did his statement conclude?

Q. It concluded—

A. I will have to get it before I can—

Q. It concluded just before the sentence which begins, "But they have agreed—"

A. Oh, yes.

Q. He did not include that sentence.

A. Well, certainly the next sentence has to be taken with that to get the setting of what went before. There is no question about that.

Mr. Stewart: Now, I move to strike that out as being a matter for the Examiner to determine. If he wants to

offer the whole book in evidence, let him offer it, the whole thing. I haven't any objection.

6548 Q. What is the next sentence?

Mr. Stewart: I object to that.

Trial Examiner Norwood: Motion denied. I take that as descriptive of something the witness wants to add to explain his true statement.

Mr. Stewart: That could not be, because look what is coming in.

Trial Examiner Norwood: He can state that. He is the author of it.

Mr. Stewart: He is not the author of it. He is not the author of it.

Trial Examiner Norwood: Answer the question.

A. I testified to that in substance.

Mr. Stewart: No, you didn't.

The Witness: Sure, I did.

By Mr. MacIntyre:

Q. What is the sentence to which you have just given reference as being necessary to give full meaning to the portion Mr. Stewart read to you?

A. The sentence reads as follows: "But they have agreed, almost without exception, that the system is essentially monopolistic in character."

(Document was thereupon marked for identification "Commission's Exhibit No. 767.")

6549 Q. Dr. Loucks, I show you Commission's Exhibit 767, for identification, and will ask you to state if you can whose statement that is which appears on that document, and to what it refers?

Mr. Stewart: Now, what—now, that is no way to ask a question. What statement are you talking about, and what page? You are not going to get this in the back door. You point out the statement you are talking about.

The Witness: Page XI.

Trial Examiner Norwood: He may identify that document.

Mr. MacIntyre: Yes. I am asking him whose statement that is that appears in this document and to what does it refer.

Trial Examiner Norwood: I think he may clarify it.

Mr. MacIntyre: Its identification.

Trial Examiner Norwood: Objection overruled.

Mr. Stewart: What page are you referring to?

BLEED THROUGH – POOR COPY

The Witness: Page 11 of the preface, or whatever you want to call it.

Mr. Stewart: All right. Go ahead.

A. This is a statement signed "C. W.," which I assume means Clair Wilcox, who accepted responsibility as author of this monograph. The statement is a statement of author's acknowledgments, in which he acknowledges assistance given him by a number of people, and I am one.

6550 By Mr. MacIntyre:

Q. And it refers to his authorship of what?

Mr. Stewart: I submit that that is immaterial.

Trial Examiner Norwood: I take it that it goes to the explanation of the origin of that paragraph which you read into the record.

Mr. Stewart: Not at all.

Trial Examiner Norwood: I think he may explain just what that is.

Mr. Stewart: Talking about the whole book now?

Trial Examiner Norwood: Now, if it does not bear on that paragraph, I am going to strike it.

Mr. MacIntyre: All right.

Trial Examiner Norwood: Objection overruled.

Go ahead.

A. The summary of responsibility for this monograph No. 21 is in the last sentence of this little note. It reads as follows:—Quote—

Trial Examiner Norwood: Wait a minute.

Mr. Stewart: That is what I am objecting to.

Trial Examiner Norwood: You may tell us anything you know about that paragraph, and I think you have already done that.

Mr. Stewart: Yes. Mr. Loucks has done that.

Trial Examiner Norwood: Yes.

6551 Mr. MacIntyre: Now, let me ask one further question:

By Mr. MacIntyre:

Q. Do the acknowledgments to which you have referred as appearing in Commission's Exhibit, for identification, 767 cover and include the monograph to which we have had reference, and which in turn includes the paragraph about which you testified on cross-examination in response to questions asked you by Mr. Stewart and in response to questions I have asked you on redirect here?

Mr. Stewart: I object to that, for that reason that the document speaks for itself. It is not a matter for the interpretation of the witness.

Trial Examiner Norwood: The objection is overruled.

A. The answer is "Yes."

Mr. MacIntyre: I offer Commission's Exhibit, for identification, 767 into evidence.

Mr. Stewart: You mean the whole book or just that page? You mean that page?

Mr. MacIntyre: Yes, that one page.

Mr. Stewart: No objection.

Trial Examiner Norwood: Received as marked.

Detach the page.

COMMISSION'S EXHIBIT NO. 767 was offered and received in evidence.

6552 The Witness: Are we on the record or off?

Trial Examiner Norwood: We are off.

(Discussion off the record.)

Trial Examiner Norwood: Proceed.

Mr. MacIntyre: I believe that is all from the witness.

Trial Examiner Norwood: Thank you.

Mr. MacIntyre: May we ask that the witness be discharged?

Trial Examiner Norwood: He may be discharged.

(Witness excused.)

Trial Examiner Norwood: Off the record now.

(Discussion off the record.)

Trial Examiner Norwood: On the record.

Mr. MacIntyre: If Your Honor please, I want to call a witness for a question and to identify a document.

Trial Examiner Norwood: All right.

JOHN MAGUIRE was thereupon called as a witness for the Commission, and, having been first duly sworn, testified as follows:

Direct Examination.

Mr. MacIntyre: Mark this the next number.

(Documents were thereupon marked for identification "Commission's Exhibits Nos. 768-A to 768-Z-134,
6553 769-A to 760-Z-20, 770-A to 770-Z-55, and 771-A to 771-Z-41.")

(Discussion off the record.)

BLEED THROUGH – POOR COPY

Mr. MacIntyre: Now, may we go on the record?

Trial Examiner Norwood: Yes.

Mr. MacIntyre: I ask if counsel for Respondents will agree that the present witness is an employee of the Commission, an Examiner for the Commission, whose duties it is to examine documents in connection with inquiries and investigations being handled by the Commission or its staff, and that in the course of the performance of his duties he has made an examination of certain documents, namely, bids, in the offices of the Procurement Division of the U. S. Treasury Department in New York City, particularly bids dealing with rigid steel conduit.

Mr. Robison: On Mr. MacIntyre's statement that that is so, I concede it.

Mr. MacIntyre: All right.

By Mr. MacIntyre:

Q. Now, Mr. Maguire, I show you documents, which have been marked for identification as Commission's Exhibit 768-A to Z-134, 769-A to Z-20, 770-A to Z-55, and 771-A to Z-41. I will ask you to state to us what they are.

A. These are copies of bids from the United States Procurement Division in New York City that were
6554 asked for by Mr. Van Der Beek but were not used in their folder.

Q. You are referring to Respondents' Exhibit, for identification, 335?

A. Yes, sir. This is the balance of it.

Q. When you say "copies of bids" do you mean they are copies of bids or tabulations of bids?

Mr. Stewart: Oh, we know what he means.

Mr. MacIntyre: Well, let us straighten it out.

A. Tabulations.

By Mr. MacIntyre:

Q. Tabulations of bids.

And do you vouch for the accuracy and correctness of these tabulations?

A. I do, sir.

Q. As disclosing accurately the information which they purport to disclose from the bids?

A. Yes, sir.

Mr. MacIntyre: That is all.

Trial Examiner Norwood: Any cross-examination?

Cross-Examination by Mr. Cleaveland.

Q. Did I understand you to say that those are tabulations of all of the abstracts prepared by Mr. Van Der Beek which are not included?

A. That is the balance of what was asked for.

6555 In other words, 409 bids asked for, Mr. Van Der Beek prepared 219, shown in the other folder, leaving a balance of 190, and in this folder here we have 157. There is a difference of 33, where only one bid was submitted, that we did not use.

Mr. MacIntyre: That is all.

Trial Examiner Norwood: The witness is discharged. (Witness excused.)

Mr. Gilpatric: At this point I would like to have the record show that, although as suggested by the Trial Examiner, we timely filed our motion excepting to his ruling excluding from evidence Respondents' Exhibit 335, for identification, the motion having been on file since March 4th, we have had no ruling and hence have not been able to act in accordance with the ruling within the balance of the proceeding.

Mr. Stewart: Just so I have it straight, Mr. Examiner, as I understand the situation, it is simply as a matter of convenience that at this point Mr. MacIntyre has had this document identified in anticipation of the ruling on the offer of the other document, and it depends on what happens there whether or not he will offer this in evidence. Is that correct?

Mr. MacIntyre: That is true.

Mr. Stewart: O. K.

Trial Examiner Norwood: Well, the counsel is

6556 not going to offer that at this time.

Mr. MacIntyre: No.

Mr. Stewart: That is the reason I asked the question.

Trial Examiner Norwood: The ruling will be the same on it. That will put them in the same situation.

Mr. Robison: That is as it should be.

Mr. MacIntyre: I want to say, however, since the matter of ruling as to whether or not I did offer them, and the ruling would be the same as was made by Your Honor on Respondents' Exhibit, for identification, 335, that I am not offering them because I do not feel that they would do anything other than meet what Respondents' Exhibit,

BLEED THROUGH – POOR COPY

for identification, 335 would, or at least purport to, show if it were received into evidence.

Trial Examiner Norwood: Well, I think the counsel may offer them before the Commission in case the Commission reverses my ruling and receives the other documents.

Mr. MacIntyre: I conceded time after time here that there were some instances in which Respondents have departed from the use of the basing-point system in quoting prices and have not quoted identical prices in all instances.

Trial Examiner Norwood: Yes.

Mr. MacIntyre: I have done that time after time.

Mr. Stewart: I don't mean to be discourteous at
6557 all. I just want—

Trial Examiner Norwood: I take it that the charge in the paragraph which the Respondents have cited heretofore that certain practices were carried out without—

Mr. Gilpatric: Deviation.

Trial Examiner Norwood: —without deviation,—I take it that that much of that charge is withdrawn, and I so consider it.

Mr. Gilpatric: Well—I mean, are you speaking for the Commission there at this stage?

Trial Examiner Norwood: I am speaking for myself. I have rejected those papers, and I take it from what has been stated by the counsel for the Commission that that part of that charge is withdrawn and that the Commission will probably strike it. Certainly I consider that he would be estopped in contending that it was established.

Mr. Bozeman: If Your Honor please, may I make an observation?

Trial Examiner Norwood: Yes.

Mr. Bozeman: If you recall, in the direct examination of Dr. Loucks, Mr. MacIntyre put to him hypothetical facts involving an assumption that there were some identical bids to—he did not say the United States Government this time; he said contractors, and he also asked the wit-
ness whether or not he thought that would indicate
6558 to him some evidence of collusion, in effect. The witness said, "Yes."

Now, that assumption, and others in the record, seem to me to suggest that Mr. MacIntyre intends to use those exhibits which he put into the record long ago of identical

bids to help prove, as far as he can, count 1 of the complaint, namely, that there was a conspiracy.

You recall that Your Honor in making your ruling on this which was rejected assumed that he was not going to argue that particular point.

Trial Examiner Norwood: I did not assume he was not going to argue that. It is just that one point. Let us get that clear.

Mr. Gilpatric: Just to clarify—

Trial Examiner Norwood: In other words, the complaint will be taken as if the words "without deviation" were stricken therefrom. That is all that I was implying on that.

Mr. Bozeman: I understood Your Honor to mean also that his exhibits on identical bids were not to be taken as evidence in themselves of collusion or conspiracy.

Trial Examiner Norwood: No, I did not say anything like that. The matter of conspiracies and agreements is to be considered after study of the entire record and based upon the entire record.

Mr. Gilpatric: Omitting what we put in to rebut the very argument that he is going to make?

6559 Trial Examiner Norwood: I shouldn't think so. I should think that, as far as those papers rebutting that argument, is extremely remote.

Mr. Robison: Just one thing—

Trial Examiner Norwood: At any rate, that is a matter for the Commission, and counsel have their exception. I feel that the Commission will do the right thing about it.

Mr. Robison: Just one thing I want to say in connection with what you, Mr. Examiner, said.

Trial Examiner Norwood: Yes.

Mr. Robison: I do not want my silence to be taken as acquiescence in what you have suggested, that the Commission can by any right amend its complaint in the midst of a proceeding, either formally or informally. I mean by that I do not see that they can do it informally, and I am not at all sure that they can do it formally.

Trial Examiner Norwood: Counsel thinks they can't withdraw the charge at any time?

Mr. Robison: May I answer off the record?

Trial Examiner Norwood: It would be different when you add a charge.

Mr. Robison: May I answer off the record?

Trial Examiner Norwood: Well, you may put it on the record.

Mr. Robison: If you wish me to.

6560 I would say yes, I have a good deal of doubt about it under the statute.

Trial Examiner Norwood: Go ahead.

Now, off the record a minute.

(Discussion off the record.)

Trial Examiner Norwood: Back to the record.

Now, there is no further testimony or evidence to be offered, as I understand it.

Mr. Gilpatric: No.

Trial Examiner Norwood: Now, in order to give counsel an opportunity to forward to me corrections to the record, and in order to give them time to make motions, it is the desire of counsel on both sides that this hearing be reconvened on March 31st for those purposes only, that is, for corrections to the record and for motions.

Now, I will ask counsel to begin to prepare their statements of recommended findings, if they want them, because I shall not extend the time beyond the closing on March 31st. We will receive no further evidence or testimony and will meet on March 31st to correct the record and to receive these motions, and the case will be closed on that date.

Mr. Gilpatric: Well, will we have the ten-day period after that date?

Trial Examiner Norwood: Yes. Your ten-day

6561 period for filing recommended findings will commence on the 31st; and all other times, times for filing briefs, time for filing the Trial Examiner's report, as per your rules of practice there.

Mr. Stewart: Well, may I inquire, Mr. Examiner, as to motions to strike out testimony? Should they be a matter of making them on the record?

Trial Examiner Norwood: They may go right on the record.

Mr. Stewart: That is what I mean. Motions for dismissal have to be in writing, as I understand it.

Trial Examiner Norwood: Yes.

The hearing is now adjourned to reconvene on Tuesday, March 31, 1942, at 10 o'clock a. m., in the office of the Federal Trade Commission, Washington, D. C.

(Whereupon, at 12:35 o'clock p. m., March 14, 1942, the hearing in the above-entitled matter was adjourned.)

6564 Proceedings.

Trial Examiner Norwood: Hearing come to order.

Pursuant to adjournment on March 14th, the hearing in Docket 4452 is now reconvened in Room 532, Office of the Federal Trade Commission, Washington, D. C., at 10 o'clock a. m., March 31, 1942.

6587 Trial Examiner Norwood: Now, counsel may check those with the copies of their suggested corrections, and if anything is really material, why, they may take it up with me.

Now, is there anything further?

Mr. MacIntyre: Well, Your Honor please, before we get into the matter of motions, I have a matter or so here that I would like to comment on the record with respect to.

Trial Examiner Norwood: Go ahead.

Mr. MacIntyre: I have already spoken to counsel, or at least some of the counsel for the Respondents about it. When Mr. Maguire was on the stand as a witness for the Commission on March 14 and at page 6553 identified certain tabulations for me I overlooked asking him the

6588 question as to what was the meaning of certain numbers and dates that appear thereon in red. They are, as I understand it from the witness, the invitation number and the date of the invitation involved in each of the instances which are tabulated on the various sheets in Commission's Exhibits, for identification, 769, 770, and 771 through each of the lettered pages thereto, and I would like to ask if counsel for Respondents will now concede that those invitation numbers in red and dates in red are the invitation numbers and the invitation dates which were taken down by Mr. Maguire from the original records and placed on this.

Mr. Robison: That will be conceded, as far as we are concerned.

Mr. MacIntyre: Thank you, now.

Trial Examiner Norwood: Wait a minute now.

Mr. MacIntyre: We were in a hurry that day, and I just overlooked asking him that one question.

Trial Examiner Norwood: Let the record show the agreement of counsel.

Mr. MacIntyre: Now, I have one further question I would like to dispose of, and that deals with subparagraph (12) of paragraph 6 of count I of the complaint. I now

state for the record that, upon authority granted me by the Commission, that I as counsel for the Commission will no longer rely upon—in fact, I am abandoning—those
6589 portions of paragraph 6, subparagraph (12) of Count I of the complaint in this case which reads as follows: "For substantial periods of time" and—

Mr. Stewart: Say, pardon me. Where are you reading from?

Mr. MacIntyre: Off the record.

(Discussion off the record.)

Mr. MacIntyre: —"without deviation until other prices, terms, and conditions of sale were likewise quoted and published,". Therefore, the remaining portions of that mentioned subparagraph which is now relied upon remain as follows: "Agreed to adhere to their announced prices, terms and conditions of sale and have adhered to such prices, terms and conditions of sale."

Will you please read that to me, now, this last quotation I gave?

Mr. King: I would like to inquire, Mr. Examiner, how Mr. MacIntyre got—

Trial Examiner Norwood: Let him finish reading it.

(Record read.)

Trial Examiner Norwood: I will hear from Mr. King.

Mr. King: I just would like to inquire for my own information about a statement Mr. MacIntyre made. He said he had permission from the Commission to make this change. I take it that is without reference to the
6590 rights of any Respondent. I would like to know how that came about.

Mr. MacIntyre: I don't think that it was secured—that is, permission to do that was secured—with concurrence with the Respondents, if that is what you are asking, because I did not ask any Respondent as to whether or not I may abandon any part of the complaint. I merely asked the Commission if I may abandon that particular portion of the complaint. If that answers the question, which I trust that it does, I am happy about it.

Mr. King: It does. I am very happy about it, too.

Mr. MacIntyre: Now, in this connection, I would also like to say that whatever I have conceded by abandonment of that particular portion of that subparagraph, it should be taken in the light of the concession that I made on the record beginning at line 19, page 6556 of the record, March

14, 1942, as well as similar concessions which were made previous thereto.

Mr. Stewart: Well, I shall have to object. If the pleading is going to be amended it has to be amended to strike out without any qualification. I take it you cannot amend it and put a condition on the amendment.

Mr. MacIntyre: I am not putting a condition on the amendment. I merely intend to inform Respondents through what I have stated on the record this morning that I am no longer relying upon, in fact, am abandoning, the portions as stated.

6591 Trial Examiner Norwood: I think that is all right. I will allow the elimination of those portions that have been stricken, as far as my report is concerned. Counsel may present it to the Commission.

Off the record.

(Discussion off the record.)

Mr. Robison: Are you through?

Mr. MacIntyre: Yes; that is all I have.

Trial Examiner Norwood: Counsel may make their motions now.

Mr. Robison: Before the motions proceed, Mr. Examiner, I ask leave, in behalf of Mr. Bozeman, who is not here this morning, to state that there has been filed in the Secretary's office this morning by counsel for General Electric Company, General Electric Supply Corporation and A. E. Newman motions to dismiss the complaint as against those three Respondents.

Trial Examiner Norwood: Let the record show that.

Mr. Austin: Can we go off the record a minute, Your Honor?

Trial Examiner Norwood: Off the record.

6595 (Discussion off the record.)

Mr. Austin: On the record.

I would like to have the record note that I am filing today, March 31st, a motion to dismiss with the Secretary of the Commission in behalf of those clients I represent in this case.

Trial Examiner Norwood: That is, the National Electrical Wholesalers Association?

Mr. Austin: And the named individual Respondents and companies that I have appeared for. Just for your convenience, I will let you have a copy of that (handing motion to Examiner).

BLEED THROUGH = POOR COPY

Trial Examiner Norwood: Well, the counsel may pursue that further before the Commission.

Mr. Ward: Mr. Examiner, on behalf of the Respondent, Graybar Electric Company, I also want to file today my motion to dismiss the complaint with Secretary Johnson of the Commission. I also join in Mr. Austin's motion to strike.

Trial Examiner Norwood: You are filing that with the Secretary, are you?

Mr. Ward: Yes, sir.

Trial Examiner Norwood: Let the record show it.

Mr. Taylor: May I go off the record?

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

6596 Mr. Taylor: If Your Honor please, on behalf of my client, the Westinghouse Electric Supply Company, I wish to concur in Mr. Austin's motion to strike the stated Commission's exhibits except in so far as it applies to Commission's Exhibits Nos. 91, 187, 235, 264, and 270, and I wish to further add as exhibits which I move to strike Commission's Exhibits 49-A through D, 254, 521 through 524, inclusive, 560, 577-A and B, 603 through 606, inclusive, 629 through 633, inclusive, and 589.

Off the record.

(Discussion off the record.)

Mr. MacIntyre: I want the record to show that I oppose that motion as well as all the other motions to strike evidence.

Mr. Gentholts: May I make a statement for the record, Your Honor?

Trial Examiner Norwood: Yes. Go right ahead.

Mr. Gentholts: Mr. Examiner, on behalf of Steel & Tubes, Inc., I am filing with the Secretary of the Commission today a renewal of the motion for the dismissal of Steel & Tubes, Inc., now dissolved, as a party to these proceedings. Also, on behalf of Republic Steel Corporation, I am filing with the Secretary today a motion for the dismissal of Republic Steel Corporation as party to these proceedings.

Mr. King: Might I make a brief statement, sir?

6597 Trial Examiner Norwood: Yes, sir; Mr. King.

Mr. King: On behalf of Clayton Mark & Company, I renew the motion heretofore filed with the Commission, overruled by them with the right to renew. I also—

Trial Examiner Norwood: That was a motion to dismiss, was it?

Mr. King: That was a motion to dismiss, sir. I also move to dismiss the complaint and each count thereof on the ground that there is not a scintilla of proof of any of the allegations of either of the counts, so far as Clayton Mark is concerned, and I will say with reference to these two motions that I will file a written motion with the Secretary's office renewing the prime motion and making the second motion to dismiss.

At this time I also renew all objections made by me to testimony and all motions to strike testimony. I furthermore move to dismiss, in behalf of Clayton Mark & Company, on the ground that any reference that does appear in the record to that Respondent concerns alleged acts that occurred prior to 1938 and that there is no proof that any of those alleged acts injured competitors in any way.

Thank you, sir.

Mr. Welch: Your Honor, on behalf of the Organization Service Corporation, Herbert S. Blake, *et al.*, Respondents for whom I appear, I have a written motion here
6598 which I would like to file and have copied in the record. I have included in this motion, motion to strike testimony and exhibits and also motion to dismiss the complaint. I presume that it would be a better practice for me to file the motion to dismiss the complaint with the Commission itself, and I reserve the right to do that at a later time.

Trial Examiner Norwood: Yes, counsel may. But he should file that immediately or without delay.

Mr. Welch: Yes, I will do that.

(The motion referred to reads as follows:)

UNITED STATES OF AMERICA,

Before the Federal Trade Commission.

In the Matter of
Rigid Steel Conduit Association, *et al.* } Docket No. 4452

Now comes the respondents Organization Service Corporation, Herbert S. Blake, individually and as President of Organization Service Corporation, Herbert S. Blake, Jr., individually and as Vice President of Organization Service Corporation, N. Myles Brown, individually and as Vice President of Organization Service Corporation,
Thomas B. Jordan, individually and as Vice Presi-
6599 dent of Organization Service Corporation, C. C. Gregory, individually and as Secretary of Organization Service Corporation, Paul Weiss, individually and as Treasurer of Organization Service Corporation, and Robert S. Booth, individually and as an employee of Organization Service Corporation, by their attorneys, Tibbetts, Lewis, Lazo & Welch, upon the record in this proceeding and upon the exhibits introduced on the trial thereof, make the following motions with respect to the following individuals:

1. That the complaint herein be dismissed as against Herbert S. Blake, Jr., N. Myles Brown, Thomas B. Jordan, C. C. Gregory and Paul Weiss, individually, on the ground that there is no evidence connecting any of said individuals with any of the matters charged in the complaint.

2. That the complaint herein be dismissed as against the respondents Herbert S. Blake and Robert S. Booth on the ground that the petitioner has failed to prove the connection, if any, of either of said individuals with any of the alleged acts of conspiracy set forth in the complaint and that the proof adduced concerning said respondents does not tend to establish the acts of said respondents to have been unlawful within the meaning of the allegations of the complaint herein.

3. That the complaint herein be dismissed as against Organization Service Corporation, Herbert S. Blake, as
President of Organization Service Corporation, Her-
6600 bert S. Blake, Jr., as Vice President of Organization Service Corporation, N. Myles Brown as Vice Presi-

dent of Organization Service Corporation, Thomas R. Jordan as Vice President of Organization Service Corporation, C. C. Gregory as Secretary of Organization Service Corporation, and Paul Weiss as Treasurer of Organization Service Corporation, on the grounds that petitioner has failed to show that Organization Service Corporation or its officers have been guilty of the acts alleged in the complaint to have been unlawful within the meaning of the complaint; that the dealings of Organization Service Corporation with Rigid Steel Conduit Association were had through Herbert S. Blake and Robert S. Booth from the latter part of the year 1936 down through April 19, 1939 and terminated thereafter; that said dealings were had pursuant to a contract which had been terminated and was not renewed; that said dealings were proved to be legal and proper; that Rigid Steel Conduit Association was dissolved in 1940 and no further dealings could be had between Organization Service Corporation and its officers with Rigid Steel Conduit Association; that said contract had been terminated and Rigid Steel Conduit Association is dissolved.

4. That the testimony of Samuel L. Williams relating to statements made to him by Robert M. Garland concerning the above named respondents be stricken from the record on the grounds that the petitioner has failed to prove that said Robert M. Garland was a conspirator; that
6601 said statements were hearsay, were a narration of past events (should it be held that he were a conspirator), and were not made in furtherance of a conspiracy, and further that there is no proof of authority of said Garland to speak for others; that the testimony of Samuel L. Williams relating to statements made to him by L. R. Quinn concerning the above named respondents be stricken from the record on the grounds that the petitioner has failed to prove that said L. R. Quinn was a conspirator; that said statements were hearsay, were a narration of past events (should it be held that he were a conspirator), and were not made in furtherance of a conspiracy, and further that there is no proof of authority of said Quinn to speak for others; that the testimony of Samuel L. Williams relating to statements made to him by J. M. Barton concerning the above named respondents be stricken from the record on the grounds that the petitioner has failed to prove that said J. M. Barton was a conspirator; that said statements were hearsay, were a

BLEED THROUGH = POOR COPY

narration of past events (should it be held that he were a conspirator), and were not made in furtherance of a conspiracy, and further that there is no proof of authority of said Barton to speak for others.

5. That the testimony of Eugene Carmichael relating to conversations had by him with Fred R. Eiseman and Arnold H. Freund concerning the above named respondents, be stricken from the record on the grounds that
6602 the petitioner has failed to prove that the said Fred R. Eiseman and Arnold H. Freund were conspirators; that the statements were hearsay, were a narration of past events (should it be held that they were conspirators), and were not made in furtherance of a conspiracy, and further that there is no proof of authority of the said Fred R. Eiseman or Arnold H. Freund to speak for others.

6. That Exhibits 533A and B be stricken from the record on the grounds that its authenticity and authorship have not been proved; that it did not come under the stipulation entered into between the attorneys for the petitioner and the respondents concerning authenticity of documents, which is set forth in the record of the first day's hearing at page 21 et seq., and that the document is wholly incompetent.

Dated Washington, D. C.
March 31, 1942.

Tibbets, Lewis Lazo & Welch,
Attorneys for Respondents Herbert S. Blake, individually and as President of Organization Service Corporation; Herbert S. Blake, Jr., individually and as Vice President of Organization Service Corporation; N. Myles Brown, individually and as Vice President of Organization Service Corporation; Thomas B. Jordan, individually and as Vice President of Organization Service Corporation; C. C. Gregory, individually and as Secretary of Organization Service Corporation; Paul Weiss, individually and as Treasurer of Organization Service Corporation; and Robert S. Booth, individually and as an Employee of Organization Service Corporation.

6603 Trial Examiner Norwood: Now these motions to strike evidence I shall rule on at our afternoon session, and all motions to dismiss will be transmitted with the record and, as the counsel has stated, to the Commission.

Mr. MacIntyre: I want the record to show that I oppose also this motion of Mr. Welch to strike evidence.

Trial Examiner Norwood: Yes.

Mr. Houston: I would like the record to show that I am filing with the Secretary of the Commission today a renewal of the motion heretofore made by me, in behalf of the clients whom I represent, to dismiss the complaint against them.

Mr. Taylor: If Your Honor please, I would like the record to show that I am going to file with the Secretary of the Commission today a motion to dismiss the complaint in so far as it applies to my client, the Westinghouse Electric Supply Corporation.

Trial Examiner Norwood: Yes. Any further motions?

Mr. Stewart: Well, as I understood it, Mr. Examiner, you understood me to say that I was deferring the motion to strike testimony until after lunch, because it is going to be long.

Mr. Stewart: And I am going to make an argument. I am not just going to make a motion to strike. At
6604 least, I expect to.

Trial Examiner Norwood: I am deferring my ruling on that, but I want all such motions put in right now.

Mr. Stewart: Oh, all right. Then I will dictate it into the record. I did not realize it. But I would like to be heard on it.

Trial Examiner Norwood: Yes. Now, can you give me a written copy of that?

Mr. Stewart: I thought I would dictate it into the—yes, I can give it to you.

Trial Examiner Norwood: That is for use over the lunch hour.

Mr. Stewart: Yes.

Trial Examiner Norwood: Go ahead.

Mr. Stewart: In behalf of the manufacturing respondents I represent and such other respondents as may wish to join therein, I move to strike out the following exhibits: Commission's Exhibits 91 to 304, inclusive, 39-A to E, 40-A to D, 41-A and B, 42, 533, 455, 457, 458, 459, 462, 463 and 466, inclusive, 467, 470, 471, 472, 474, 521, 522, 524, 526 to

FLEER THROUGH - POOR COPY

528, inclusive, 565 to 570, inclusive, 572 to 573, 578 to 601, inclusive, and 612 to 617, inclusive, 691, 692, and 693.

Trial Examiner Norwood: The ruling will be deferred until the afternoon session.

6605 Mr. MacIntyre: I want the record to show that I oppose that motion to strike, and I certainly understand why Mr. Stewart and the other Respondents will probably want these exhibits out. They most certainly have fought very strenuously to keep out such exhibits as that 533 which, of course, shows just what was in the minds of these Respondents.

Mr. Stewart: We will get to that.

Mr. King: Are you through, Mr. Stewart?

Mr. Stewart: Yes.

Mr. King: Before we adjourn, Mr. Examiner, just to make sure, in what Your Honor has heretofore described as an abundance of caution, I would like the record to show that my understanding still is that each Respondent is entitled to the benefit of any motions made by any other Respondent.

Trial Examiner Norwood: Yes.

Mr. King: I would like to know whether I am correct in that.

Trial Examiner Norwood: Yes. I think so.

Mr. Stewart: That is entirely agreeable to me, but I did not know whether that would prevail at this stage and I wanted to make sure.

Mr. King: That is the reason I brought it out.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Recess until 2 o'clock.

(At 11:45 a. m. a recess was taken until 2 p. m.)

6606 Afternoon Session.

2 P. M.

Trial Examiner Norwood: Hearing come to order.

I will hear from the counsel on your motion to strike certain exhibits, from Mr. Stewart.

Mr. Austin: Your Honor please, I have no intention or desire to argue that motion at the present time. As far as—

Trial Examiner Norwood: Mr. Stewart wanted to be heard on his motion.

Mr. Austin: Yes.

Mr. Stewart: Mr. Examiner, just in order of sequence, Exhibits 91 to 304, which, as you will note, cover 213 exhibits, relate to the N.R.A. material. Now, I am firmly of the opinion that that testimony is not admissible on any theory. If it be regarded as admitted for the purpose of showing that there was any excess of authority exercised by Mr. Hodkinson, the administrator, then obviously, in my judgment, what Mr. Hodkinson did, he being an officer of the N.R.A. administration, is not chargeable to these respondents. If it be admissible, or if the contention be that, in view of the fact that the law was declared unconstitutional, then the answer to that is that that is of no moment to these people who were acting under that law, even though it was subsequently held unconstitutional, because they had a perfect right and they were bound,

6607 for that matter, during the existence of the law to obey it. There has been no showing, as I understand the record, of any excess—or any acts in excess of the authority granted to the administrator. As I say, it would make no difference in any event because that is not chargeable to these Respondents. In short, so long as the Respondents acted during that period pursuant to a law of the United States, even though it was subsequently declared unconstitutional, they cannot be charged with having done anything illegal.

Now, there is another aspect to that which, I think, should give us some thought, and that is the N.R.A. period is really prior to any period, unless you are going to construe the language of the complaint of six years and upwards as including any period prior to 1941. In other words, that is an indefinite averment, and you can go back

BLEED THROUGH – POOR COPY

as far as you want. But bear in mind that prior to 1938 the Federal Trade Commission had no jurisdiction over a complaint such as this one. In other words, if these Respondents had been charged with conspiracy in restraint of trade, then it would have required an averment, and not only an averment but proof as well, that an injury to the —to competitors was a result of that conspiracy; so that you have a period during which these Respondents were not only obeying the law of the United States, but in addition, a period during which there could not have been any proof of conspiracy under the allegations of this
6608 complaint because the complaint does not aver that.

Now, if these—

Trial Examiner Norwood: Does the counsel contend in trade restraining cases, or cases against methods pertaining to monopoly, that you would have to show injury to competitors?

Mr. Stewart: Well, I don't understand that this complaint charges a monopoly, at least I don't so agree. I understand that it charges price fixing.

Trial Examiner Norwood: Go ahead.

Mr. Stewart: Of course, it is a little bit difficult for me to understand just what the complaint does charge. It is worded in such a way that you can drive a four-horse team through it. You can probably claim anything, and that is one reason when I filed my answer I raised the objection that it was vague and indefinite and it was not sufficient to charge an offense, but, as I understand it, until the Federal Trade Commission Act was amended, the limit of the Commission was over unfair methods of competition which required a showing—not only a showing, but an averment in the complaint and proof, of course, pursuant to that—of injury to competitors. I don't understand that the complaint even approaches that.

Now, as I say, if these exhibits were only few in number it would not make any material difference because we could insist on the same point at the close of the case
6609 in the argument in the briefs, but here you have 213 exhibits and a great deal of that material is obviously correspondence between the Administrator and the various members of the Code and I say that that is material which none of us should be obliged to go over and comment on in brief, if my position be sound.

Of course, there is another angle to that which is ap-

plicable to a great many of these exhibits, and that is if it be charged—if the testimony be admissible at all it would only be on the theory that it was pursuant to a conspiracy and that the Acts of the conspirators were pursuant to the conspiracy, and I don't see how on any theory anything they did under the N.R.A. Code could be said to come within that category.

Now, the second set of exhibits is the National Electrical Wholesalers Association minutes. I don't pretend to be exact about the dates, but, as I recall it, some of those minutes go back at least to 1916. I may be mistaken about that, but in any event they go back a long, long ways. Now, there is no charge in this—I am sorry, I am mistaken. I am talking about the National Electrical Wholesalers minutes. I take it that is covered by Mr. Austin's motion, so I shall not argue that.

(Discussion off the record.)

Mr. Stewart: The National Electrical Whole-
6610 salers Association minutes, I say, are not admissible as against the manufacturing respondents, and, of course, I am only speaking in regard to the manufacturing respondents for the reason—yes, and Mr. Blake as well—for the reason that there is no showing at all that the manufacturing respondents were in any way chargeable with any responsibility for what was done in those proceedings. In other words, those minutes were acts solely and simply of those wholesalers, and there is no showing of agency, which is always essential in a conspiracy charge in order to make them admissible in evidence.

Now, the next document is 533, which is the famous counselor memorandum. Now, you will probably recall, Mr. Examiner, that that is a document which Mr. MacIntyre in a conversation with Mr. Garland obtained from Mr. Garland a statement, not under oath, that Mr. Blake had written that document. Now, I take it that up to that point that surely that was the rankest sort of hearsay because there was no doubt—while there is no doubt that Mr. Garland said that, the fact remains that it was long after any conspiracy had ended, and it was purely a voluntary statement on his part, and obviously an opinion. Now, then, when we put him on the stand under oath he admitted that he did not know who the author of the document was, so you have the situation in which Mr. MacIntyre's hearsay statement, which was not made un-

der oath, is absolutely repudiated under oath by the
6611 very man who made the statement to him. Now, if any other witness among the manufacturing respondents, or, for that matter, any witness in the case, had been able to identify the author of that document, I take it, of course, that that would have been taken into consideration in determining its admissibility, but—

Trial Examiner Norwood: It is not denied that there was a committee meeting and that the subject of this paper was considered there—

Mr. Stewart: No. No.

Trial Examiner Norwood: —and left on the table?

Mr. Stewart: No. No; there is no such testimony as that in the record at all. All that appears in that connection is that Mr. Booth said that after a meeting he found the paper lying on the table. Now, that is all there is to it. Now, Mr. Blake said he never saw it.

Trial Examiner Norwood: Isn't this some evidence of what that meeting was about?

Mr. Stewart: There was a conference of the committee, the three members of the committee, which related to the employment of Blake, but that surely does not make that document admissible just because somebody talked about employing Blake. My own idea of it is that somebody got up a memorandum as to what he thought Blake ought to do, but the fact remains that we don't know who did
6612 it, and surely you can't get in evidence a document on any such slim theory as that. There is nobody who authenticates it. It is just something that somebody found somewhere, and, as I say, the very witness that is used by the Commission to try to get the document in evidence under oath repudiates it and admits he does not know who wrote it. He just simply thought that Mr. Blake had written it. He put two and two together and made four out of it and it turned out that he was wrong, but the point of it is that you have this undenied testimony of Mr. Garland under oath that he did not know who wrote the document. Now, then, the documents which were written by Mr. Austin—and I put them all in the same category, because I want to call your attention to the fact that Mr. Austin is dead and, as I understand it, the Supreme Court of the United States at least has said that courts of justice lend a very unwilling ear to statements of what dead men have said, so it is really difficult to

cross-examine them and find out whether they knew what they were talking about, because you don't know their address, to begin with. But, as I understand the law of conspiracy and, as nearly as I can gather, my friend seems to entertain the idea that all you have to do is charge a conspiracy and that permits you to put in everything but the Koran, and if it mentions conduit, that permits you to put the Koran in, too. As I understand it, under a charge of conspiracy you first have to prove your conspiracy.

6613 Having proved your conspiracy and having identified your conspirators, then anything that is done or said by the conspirators in furtherance of the conspiracy is admissible in evidence. Now, the mere fact that an alleged conspirator wrote a letter does not make that letter admissible unless it can be shown that that letter is written in pursuance of and in furtherance of the conspiracy.

Now, the Austin correspondence is obviously correspondance between Austin and his sales force or between Austin and McCullough, in which they are arguing about their own private matters. Now, Mr. Austin at times undertakes to say what took place in the rigid steel conduit meeting in New York. Now, Mr. Austin was in Chicago; he was never in New York; never attended a meeting; was not a member of the Association, so I don't know how far out his information—that is, how far out his source of information was, whether it was firsthand, secondhand, or thirdhand, but the fact remains that he was undoubtedly not only repeating what somebody told him, but obviously putting his own construction on it, and I submit that that sort of testimony is not admissible.

Now, then, there are three letters, Exhibits 457, 458, and 462—oh, there are four more, making seven altogether, 463 to 466, inclusive, and, as you will recall no doubt, at the time those were put in evidence I insisted that, since they related to armored cable and not rigid steel

6614 conduit, that they could not have any bearing on any issue in this case. Then there is a letter, 467, which has to do with sheathed cable, which, of course, is not rigid steel conduit, and 470, which has to do with thin wall conduit. Now, then, the letters 521, 522, 524—

Trial Examiner Norwood: Well, now, those are the products there. Why, some of them were put in evidence here by the Respondents—

Mr. Stewart: No, no.

Trial Examiner Norwood: —to show competing products.

Mr. Stewart: No. No.

Trial Examiner Norwood: That cable—

Mr. Stewart: No correspondence. We showed that—yes, we showed that armored cable and the others competed with us, but that is no reason to put in, it seems to me, correspondence between McCullough and Austin and Friend and Pomeroy and others with relation to their particular product.

Trial Examiner Norwood: Go ahead.

Mr. Stewart: Now, then, the Baldwin-Hall and Cohoes exhibits, which are Exhibits 521 to 524, inclusive, are purely and simply matters between those parties, and on no theory in furtherance of any alleged conspiracy, and the same is true of Mr. Bennett's correspondence, 565 to 570 and 578 to 601 and 612 to 617, inclusive. What they
6615 were doing was writing letters to their own sales force undertaking to either give them a pep talk or indulging in some sales talk of some nature which on no theory could be held to have been a carrying out of any conspiracy alleged in this complaint, and, as has been well said, the mere fact that a conspirator writes a letter does not make it admissible, and the reason I am complaining about this so vigorously at this point is that I don't think it is fair to make us go through all this terrific correspondence and answer it, not knowing whether it is usable or not, if we are right about it. It seems to me it ought to be determined now.

Now, as to the NEMA minutes, 691, 692 and 693, I submit they are entirely too remote. Now, there is nothing in this complaint which puts us on notice that there is any charge of conspiracy originating back in 1916, or however far back those minutes go. Now, I can understand—I know, in fact, that you are entitled to lay the historical basis of a conspiracy, but even then, as I understand those cases, there is generally a charge in the complaint that the conspiracy originated back on such and such a date, so that you are on notice as to what you have to meet. Now, NEMA, as you remember it, was the National Electrical Manufacturers Association, and in that Association there was what was called the Rigid Steel Conduit Section. The members of that section were in part some of the pres-

ent Respondents but in part companies which are no
6616 longer in existence. There were individuals involved in it who are now dead or no longer available, and it does seem to me that that testimony is entirely too remote and should go out of this record.

Now, I think that we ought not to be left in the position where three or four hundred exhibits are in the record, and that requires considerable work, requires considerable expense in the way of commenting on them. I am assuming now, of course, that in whole or in part you will agree that our position is sound, and I submit that these motions to strike out should be sustained.

Excuse me just a minute.

(There was a conference among counsel off the record.)

Mr. Stewart: Mr. Welch has asked me to call your attention to the Carmichael and Williams testimony with regard to their conversations with Major Quinn and with Mr. Blake and others. Now, in that connection I take it you are familiar with the well settled principles of law, and that is that testimony from investigators—and I don't mean that in any offensive sense—conversations had with persons long after the event, I mean the conversation takes place long after the event in which the person is recounting in narrative form something that occurred a long time before, and then when the witness testifies he again is more or less recounting and putting his own inter-
6617 pretation of what the narrator told him—in those cases, as you no doubt well know, the courts are very, very cautious about accepting such testimony. It is obviously hearsay, and I take it you are also familiar with the very well settled rule that any narrative form of statement of past events, even from a conspirator, alleged coconspirator, is never admissible; you can't get that in on any theory.

Trial Examiner Norwood: Not even as admissions?

Mr. Stewart: No. As against a particular conspirator —oh, yes, as against a particular one, but that testimony did not come in here on that theory. It was offered as against everybody, and there is a very interesting discussion of the whole subject, if you will care to look at it at your leisure, in the Aluminum Company case in 1 Fed. Rules Decisions 1, in which the court had almost every decision which we have before him in that case, and there

is also some very interesting law in numerous cases on the subject, and I have no doubt you are familiar with it. But I am not making this motion pro forma. I am making it in all seriousness. I think it is unfair if we are right to leave all this material, in, especially when it came in with the understanding that if it was not subsequently connected it would be stricken out.

Mr. MacIntyre: If Your Honor please—

Trial Examiner Norwood: Any of the other coun-
6618 sel have any statements in support of their motion?
I mean any further statements?

I will hear from Mr. MacIntyre.

Mr. MacIntyre: If Your Honor please, in reply to Mr. Stewart, I would like to make these observations, first, about this N.R.A. material, as he calls it. It is not N.R.A. material. It is writings of these Respondents and their representatives. Mr. Hodkinson was not a Government employee. He was an agent of these Respondents. He did their bidding; he helped them fix prices, and it was not sanctioned by law, either one that was then a color of law or one that has since been repudiated by the Supreme Court. He was absolutely outside of the sanction of any color of any law in the fixing of those prices. On this question of the Trade Commission jurisdiction prior to 1938, evidently Mr. Stewart has overlooked some rather important cases among which are the Pacific States Paper Trade Association case and the Beechnut case and others along that line which, of course, were decided long before 1938.

We come down to the exhibits that he mentioned as involving reports of the National Electrical Wholesalers Association. Of course, Mr. Austin did not move to strike those this morning. He moved to strike some others. Mr. Stewart now moved to strike those. It is a technique that

we are well acquainted with of divide and conquer;
6619 in other words, Mr. Austin can take part of them,
Mr. Stewart the other, and if you divide all these Respondents up and keep them separated for the rest of time, of course they would not be combining, but the counsel for them have started at a late date. They should have separated them long ago.

Now, on this question of the exhibits that deal with the armored cable, it so happens that the action of the Respondents which is disclosed through the reading of those

particular exhibits is action that involves a curbing of competition, not only between them as manufacturers of rigid steel conduit, but between and among them as manufacturers of a competitive product of rigid steel conduit, and it goes further. It shows purpose. The same thing can be said as to all of these first exhibits—

Trial Examiner Norwood: You mean part of a general plan?

Mr. MacIntyre: Yes, purpose of their general plan, and again these Exhibits 91 to 304 serve a useful purpose in this record in getting at the general purpose of these Respondents to suppress price competition and other competition in the sale of rigid steel conduit. If they served no other purpose, they would be admissible here for that purpose alone; that is, the activities of Mr. Hodkinson and the letters that passed between him and these other Respondents in connection with their activities. They
6620 clearly show that their purpose was to fix prices and, of course, not to make for fair labor standards such as was originally conceived when N.R.A. was set up.

Now, we come to the letters of Mr. Bennett, I. A. Bennett, of the National Electrical Products Corporation. Mr. Bennett in those letters outlined to a degree what the history of the action of these Respondents was in their meetings, how it was taken up, put into operation by his company and others after the meetings. In other words, they outlined step by step just how this conspiracy operated in some respects during that period of time that was covered by the letters, and it does not matter that they are letters from one of the Respondents to some of his agents. He made that record for us to use as it has turned out. The matter of purpose, as well as some acts of conspiracy, is clearly shown on the part of these Respondents through the minutes of the meetings of the National Electrical Manufacturers Association, Rigid Steel Conduit Section. We cannot afford to throw away portions of a story which fit so well into the general picture of this conspiracy as those minutes give us. Again it would be a matter of divide and conquer. Of course, if they can divide the evidence up like that and isolate this little piece from the other, you can't show a conspiracy through each and every piece aside and apart from the other. It must all be considered together.

6621 Now, a word with respect to the Hawks and the Austin letters. If Mr. Austin's letters serve no other purpose in this record than that of explaining the letters to which they were replies, that is, the letters of Mr. Julian Hawks, they would still be admissible, and they do that and do it quite well. Mr. Hawks has been available to these Respondents for them to call him as a witness. They apparently did not desire to do so. He, therefore, has not explained his letters any more than they explain themselves which, of course, Respondents apparently have decided, as I have, that is, that that is ample and clear. Some of Mr. Austin's letters clearly show that information which he passed on to others came to him through Mr. Hawks' letters. Mr. Hawks would attend the meetings in some instances and Mr. McCullough would report to Mr. Austin what Mr. Hawks had reported to him that had taken place at the meeting, pass it on to Mr. Austin, Mr. Austin in turn would pass it on to others. There is a chain of communications involved there, and Mr. Austin's letters help explain the chain. This document 533, as I noted this morning, apparently bothers these Respondents a lot. It should, because it is condemning from the first line of the first page to the last line of the last page—

Trial Examiner Norwood: Now, what exhibit is that?

Mr. MacIntyre: That is 533.

Mr. Stewart: That is the counselor—

6622 Trial Examiner Norwood: Is that the one that was supposed to have been written by Mr. Blake?

Mr. Stewart: Yes.

Mr. MacIntyre: Yes, that is the one.

Trial Examiner Norwood: Well, what is the special significance of Mr. Blake having written it?

Mr. Stewart: He wants to pin it on Blake; that is why.

Mr. MacIntyre: Mr. Blake, of course, was one of the principal agents of these Respondents. They hired him when their conspiracy began to sag a little, they hired him to revitalize interest, give it plenty of pep and push, and this particular exhibit shows just how they intended him to give it additional necessary push.

Trial Examiner Norwood: What difference does it make if the paper was made by somebody else that was on that committee or where the inference might be drawn that he had used it—

Mr. MacIntyre: Well, frankly, I think even if it were not made by Mr. Blake and should have been made by someone else who collaborated with him during the course of this meeting that is in question, it would still carry its responsibility to each and every one of them, that is, the responsibility of each and every one for it would still remain.

Trial Examiner Norwood: Go ahead.

6623 Mr. MacIntyre: But I think the record is a little more definite and clear than that. It points from several directions to Mr. Blake. First, of course, is this statement which was given in a certification by Mr. Garland and his attorney to me that it was Blake's memo which Mr. Garland had received. Of course, Mr. Stewart correctly states that Mr. Garland came on here and testified, that is, some time afterwards, that he did not consider that he knew what he was talking about when he told me Mr. Blake wrote it. The fact remains he told me that. The fact also remains that Mr. Garland, when he did come to testify, never denied that he got it from Mr. Blake's office.

Mr. Welch: No; that is not right.

Mr. MacIntyre: He never denied that.

Mr. Welch: He said he got it from his files.

Mr. MacIntyre: He never denied that that came to him from Mr. Blake's office. In fact, the Respondents were very careful that they did not ask Mr. Garland whether or not it came through the mail from Mr. Blake's office. Possibly, if we want to play upon the imagination a little, Mr. Garland had to deduct to some degree about the writing of it if he received it from Mr. Blake's office without a full letter of explanation as to when and how and under what circumstances and on what typewriter Mr. Blake wrote it or someone else at Mr. Blake's direction.

6624 There is a further fact there that point directly to Mr. Blake, and that is his trusted servant, Mr. Booth, who testified under oath that he saw that memo on the table, in Mr. Blake's desk, at the conclusion of a meeting with Mr. Blake and some of the other leading Respondents. All of those facts along with the fact—

Trial Examiner Norwood: Off the record just a minute.

(Discussion off the record.)

Mr. MacIntyre: All of those facts, considered with the fact that it does deal with some of the subjects that we

know were involved in the discussions that took place at that meeting, certainly should give a lot of significance to the memorandum as well as its authorship and the responsibility of those who prepared it and for whom it was written. I believe that is about all I have to say.

Mr. Austin: Your Honor please—

Mr. MacIntyre: Oh, one further word, and that is about the Carmichael and Williams' testimony. I want to say this: That I consider that since that testimony was received as admissions of these Respondents, having been made to these two men who testified to those admissions, that they were properly—that is, that the admissions were properly received and should not be disturbed.

Mr. Austin: If Your Honor please, since Mr. Mac-
6625 Intyre has seen fit to comment on the strategy of counsel for the Respondents in this matter, I think it is only fair that the record show a comment on my part on the strategy on the part of the Commission. Far be it from me to argue rules of admission of evidence in conspiracy cases. I think that my motion is a fair, honestly drawn motion on the sole basis of the fact that those documents were admitted subject to connection. In spite of Mr. MacIntyre's speeches here throughout the entire hearing and today, he has not shown connection with my clients. Furthermore, he says that to conquer you must divide and rule. I think if he is going to win his fight he had to get us together before we could divide, and he has completely failed in this case to show anything approaching the grand conspiracy that he has alleged in his complaint. In my humble opinion, as I state in my motion to dismiss that I filed today, he joined the wholesalers in this case solely for the purpose of making it possible to argue the admissibility of evidence in making a record with far many more exhibits than he needed, making it most difficult for all the Respondents to put in a clear-cut succinct defense with a view, and a purely strategic view, of using a grand conspiracy to make it difficult for the Respondents to secure a fair hearing before the Commission. That has absolutely no reflection on the hearings we have had here. They have been more than fair, but how I can appear before the
6626 Commission with 765 exhibits and make any reasonable argument for the wholesalers with Mr. MacIntyre's statements in the record, with nothing further on

his part to show how he thinks those exhibits are tied in with my clients, I fail to see.

Mr. Stewart: Well, I should like to add this: In view of the fact that the suggestion was that I am very much disturbed about 533-A, I am only disturbed because my sense of justice is shocked. Of course, I admit that I am not used to administrative proceedings, but it never occurred to me to come in here and say that I got somebody in a private conversation to say that so and so wrote this document, the man not knowing who wrote it, and then when you put that very man on the stand and he holds up his hand and takes an oath to tell the truth and he says, "I don't know who wrote the document," that that makes it admissible—that is not my conception of the rules of evidence even under administrative procedure.

Trial Examiner Norwood: Don't you think that the two statements should be weighed together?

Mr. Stewart: What two statements?

Trial Examiner Norwood: Isn't there some testimony that he did write it?

Mr. Stewart: No.

Trial Examiner Norwood: Or that he acknowledged writing it?

Mr. Stewart: No. What Mr. Garland said was that
6627 he never saw the document until Mr. MacIntyre showed it to him; it did not come to his office; it came to the office down at West Pittsburgh. He never even saw it.

Now, Mr. Garland is just one of these souls who likes to be a little bit helpful, and he thought that he was going to help Mr. MacIntyre probably by volunteering something that he did not know anything about.

Trial Examiner Norwood: I shall give that very careful study, gentlemen, and I will say that, while I do not follow counsel on either side 100 percent, that their discussion has been very helpful, and will be helpful to me in making a study of these papers.

Mr. Stewart: Now, I have—

Trial Examiner Norwood: And—

Mr. Stewart: Excuse me.

Trial Examiner Norwood: —I shall consider the viewpoints that you have expressed here in going into it, but the matter of connection is something that I shall have to study out from the whole record as to whether they are connected, and that makes it impracticable, and I might

BLEED THROUGH – POOR COPY

say impossible, for me to allow these motions and strike these documents at this time. They must be left in for further study. We considered these questions separately as they were received, but I was glad to have a little review on it here today, and I think my duty is very clear in
6628 denying all of these motions for striking of evidence, that is, striking testimony or withdrawing and striking the exhibits; so I will give the counsel their exception on that and they may argue it again before the Commission.

Is there anything further?

Now, I will say that—

Mr. Welch: May we go off the record?

(Discussion off the record.)

Trial Examiner Norwood: Now, all the testimony is in and the motions, and I think we are through with this case and that it may be considered as closed as of this date upon the adjournment of this hearing.

Now, the rules of practice require me to submit my Trial Examiner's report upon the evidence within 15 days. Obviously, it would be impossible for me to do that, and I will say that I do not expect to file this report under 60 days. But that is an estimate. If I get it ready before that time I shall file it, but in the meantime I think that the importance of the case justifies counsel submitting to me statement of their contentions or their statement of fact, as provided for in Commission's Rule of Practice No. 22, and I shall receive them within, say, 15 days from the date hereof, and I will say that if you will make them in concise form I really believe that they will do more good. They will enable me to give them better consideration.

6629 Mr. Stewart: Well, off the record.

Trial Examiner Norwood: Off the record.

(Discussion off the record.)

Trial Examiner Norwood: Now, the exceptions to the Trial Examiner's report—within ten days after the receipt of the Trial Examiner's report—that is, copies of this report will be furnished the counsel, and within 10 days they are supposed to file their exceptions to the Trial Examiner's report, if any, and, on account of the importance of the case and the length of the record, the counsel can no doubt get that time extended, but you will have to apply directly to the Secretary.

I cite you to Rule of Practice No. 21 regarding the exceptions and Rule No. 20 regarding the report.

Now, Rule 23 requires the Commission to file its brief within 20 days after receipt of the Trial Examiner's report, and Respondents have 20 days on receipt of the Commission's brief to file their briefs. I don't want you to invite delay, but I feel sure that you cannot prepare briefs, neither the Commission nor the Respondents, in this time, so I will inform you that you can probably get an extension of time for that from the Commission.

If there is nothing further, the hearing is adjourned sine die.

(Whereupon, at 2:50 o'clock p.m., March 31, 1942, the hearing was closed.)

265 UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION.

• • (Caption—4452) • •

TRIAL EXAMINER'S REPORT UPON THE EVIDENCE.

John W. Norwood,
Trial Examiner.

Mailed July 23, 1942, Otis B. Johnson, Secretary, by J. W. Karsner, Chief, Docket Section.

270 Synopsis of Complaint.

Pursuant to the provisions of the Federal Trade Commission Act, as amended, the Federal Trade Commission, alleging its reason to believe that the respondents
271 named herein have violated the said Act and that a proceeding by it in respect thereof would be in the public interest, did, on the 25th day of January, 1941, issue its complaint in this proceeding, charging said respondents, in Count I and Count II thereof, with violation of Section 5 of the said Act, as amended, and alleging substantially as follows:

Count I.

I. That the Rigid Steel Conduit Association is an unincorporated organization of manufacturers of rigid steel conduit pipes which they make and sell in interstate commerce through jobbers and wholesalers located in various States and that the said manufacturers and wholesalers are in competition with each other and in combination with each other in the matter of manipulating and dominating price quotations.

II. That respondent, Organization Service Corporation, a corporation under the laws of the State of New York, together with its president, Herbert S. Blake, and other officers (named) serve as organizer, manager, director and advisor to the Rigid Steel Conduit Association and others in carrying out the unlawful policies and practices hereinafter alleged.

III. That respondent National Electrical Wholesalers Association is an unincorporated organization composed of numerous stated and represented wholesalers and jobbers engaged in the distribution of rigid steel conduit pipes and other electrical supplies in interstate commerce, together with its officers and leaders, and that these are in competition with each other, except as restrained and hindered and herein set out.

IV. That rigid steel conduit is used for containing electrical cables or wires in buildings, and that in recent years more than 125,000 tons annually have been sold and distributed in the United States by the respondents.

V. That the aforesaid three organizations, together with their officers, agents, employees, members and others, have and are engaged in carrying out wrongful or unlawful understandings, agreements, combinations and conspiracies for the purpose and with the effect of frustrating price competition in commerce.

VI. That pursuant to said undertaking, agreement, combination, or conspiracy, and in the furtherance thereof, said respondents acting in cooperation with each other and others, have followed, among others, the following practices and methods in the sale of rigid steel conduit pipe, to wit:

(1) Adopted and employed the basing point method or system of pricing:

(2) Concertedly followed a price fixing formula for ascertaining and quoting delivered costs and producing identical prices at any given destination;

(3) Concertedly maintained a pricing system which does not reflect and include actual differences in freight from different mills to the purchaser;

(4) Concertedly maintained a plan whereby the United States is divided into so-called Pittsburgh and Chicago basing point areas so that all purchasers in the respective areas received delivered cost quotations which are identical at any given time and place as between sellers regardless of the distance between various points of supply and delivery;

(5) Concertedly employed a compilation of freight factors or "Adders" for pricing purposes designed to negative differences in actual freights and differences in interpretations of freight tariffs;

(6) (7) Concertedly adopted and used uniform terms, contracts and conditions of sale;

(8) (9) Concertedly maintained a system of espionage or investigation of "protective" special building contracts and other contracts;

(10) (11) Concertedly adopted and used uniform price quotation sheet and uniform business practices;

(12) Concertedly adhered to announced prices, terms and conditions of sale until other prices, terms, and conditions were likewise quoted and published;

(13) Agreed on definition of "recognized" jobbers and dealers and as to whom should be recognized and sold at prices involving jobber or dealer discounts and terms;

(14) Concertedly circulated lists of "recognized" jobbers or dealers;

(15) Adopted and used uniform discounts and terms to jobbers, dealers, wholesalers, or "agents";

(16) Concertedly acted to maintain said agreements;

(17) Waived advantages to competitors to some instances and required purchasers in other cases to pay more in order that respondent sellers might conform to the aforesaid agreements;

(18) Agreed to employ retaliatory price action and other methods to require sellers of conduit to conform to respondent's agreements;

(19) Held meetings per agreement from time to time under the auspices of and with the Organization Service

Corporation, Rigid Steel Conduit Association, National Electrical Wholesalers Association, their officers, agents and others in furthering and carrying out the alleged unlawful acts, practices and methods;

VII. That the aforesaid acts and practices have the capacity and tendency to injure competitors, prejudice the public and unreasonably suppress and restrain trade, lessen competition, and effect monopoly in violation of Sec. 5 of the Federal Trade Commission Act.

Count II.

I. That respondent "Conduit Sellers," as named and particularly described in Count I, manufacture rigid
272 steel and conduit pipe in Pittsburgh, Pennsylvania and other locations in various States (named), and ship the same from States of origin to other States of the United States in competition with each other except where lessened as herein set forth;

II. That each respondent conduit seller (respondent manufacturers as heretofore named) with knowledge that the other respondent sellers are simultaneously doing likewise, employs the following pricing and sales practices:

(a) Generally refrains from quoting f.o.b. mill prices that are unrelated to basing point prices;

(b) Quotes a destination price made up of a basing point price plus freight "adders" applying from one or more specified basing points irrespective of the point of shipment;

(c) Employs the foregoing methods with the necessary result that the delivered prices quoted by all of respondent conduit sellers are identical for a given time and place.

III. That in the employment of the aforesaid methods respondent sellers accept and receive as an incident to the said pricing method larger sums for products of equal quality from customers located near their respective mills than from other customers located at greater distances, thus depriving the nearby customer of the natural price advantage of proximity to the point of production.

IV. That the aforesaid acts and practices as alleged in Count II have the tendency and effect of unreasonably hindering, lessening, and restraining competition and creating monopoly to the prejudice of the public and customers of respondents and in violation of Sec. 5 of the Federal Trade Commission Act.

The Answers.

To the aforesaid complaint the several respondents filed answers as contained in the record, in which answers, too voluminous in the aggregate to be incorporated herein, denial is made of the alleged violations of the said Act of Congress, and denial is made on behalf of each respondent as to any agreement or understanding with competitors or with any association or other organization as to prices, methods for figuring or quoting prices, forms of contracts, terms and other practices, policies, and methods alleged in the complaint. It is admitted that respondents employed price cards similarly numbered, based prices on Pittsburgh, Evanston and Chicago, used "freight adders" in quoting delivered prices, and used similar or identical terms and discounts on occasion; but respondents contend that the nature of the commodity, the demand therefor, and the conditions of its manufacture, sale, and use are such as to produce the aforesaid practices and methods through the natural operation of economic law, and that the methods employed by the industry were, in fact, so produced. Respondents further contend in the said answers that the methods they employ and the results therefrom are competitive and that any similarities in methods, terms, and prices found to exist in the rigid steel conduit industry are forced by said competitive conditions and the necessity of each seller to meet the prices, terms, and conditions made by its competitors. Respondents also deny that any activities on their part have the effect of restraining trade or lessening competition, and deny that the methods they employ involve unfair and discriminatory treatment of customers. Respondents further contend that their methods of pricing and distribution are more economical and more in accord with the public interest than any other methods that could be employed by them.

After the issuance of the said complaint, and the filing of the respondents' answers thereto, testimony and other evidence in support of the allegations of the said complaint were introduced by Everette MacIntyre, for the Commission, before John W. Norwood, a trial examiner of the Commission thereunto duly designated and appointed, and testimony and evidence in opposition to the allegations of the complaint and in support of the said answers and contentions were introduced by W. Denning

Stewart, Roswell L. Gilpatric, W. W. Robinson, Robert W. Austin, Job Taylor, II, Morton Peyser, Murray D. Welch, Robert M. Bozeman, Robert C. Poskanzer, Glen McDaniel, and other counsel named in the record representing the various respondents, and the same was received by the trial examiner aforesaid. The case was closed on the 31st day of March, 1942. Under Rule XXII of the Commission's Rules of Practice counsel were permitted to submit a statement of their contentions as to the facts, which were duly presented to and considered by the trial examiner, copies of which are transmitted herewith for the information of the Committee. Time for filing this report was extended by the Commission to July 23, 1942.

Whereupon, under the Rules of Practice of the Commission, your examiner makes the following

Report Upon the Evidence:

(1) Respondent, Rigid Steel Conduit Association, hereafter sometimes referred to as R.S.C.A., an unincorporated association of rigid steel conduit manufacturers, was organized on April 5, 1934, with the stated purpose of considering questions of common interest to its members with respect to the manufacture, standardization, use, sale, and distribution of their said product (Cx. 1, Rx. 37-B). Its principal office was in New York City, and its Board of Directors, on April 24, 1934, was I. A. Bennett, F. W. Hall, L. R. Quinn, H. S. Walker, and H. G. Morrow, G. H. Sicard was executive secretary from May 1, 1934. The Directors' minutes for June 7, 1937, show L. R. Quinn as presiding officer and refer to H. S. Walker as Treasurer and G. H. Sicard as Assistant Treasurer of the new Association (Rx. 36-A, 37-A and B).

(2) All of the respondent sellers named in the complaint as such and as hereafter shown, belonged to the said R.S.C.A. and participated in its activities as more particularly set out below (Cx. 3-A, 5-A, 30-B, and 38-A). Prior to the organization of the R.S.C.A., a few of the respondent sellers, as shown hereafter, carried on similar activities as members of the Rigid Conduit Section and the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies. These activities covered
273 a period beginning about 1916 and extending to about 1926 when the organization was merged into the Na-

tional Electrical Manufacturers Association (Tr. 1363-5, Cx. 691-F to I, 691-Z-266-8, 692-Z-83). Thereafter, from 1926 to the organization of the R.S.C.A. in 1934, respondent sellers belonged to and participated in the activities of the Rigid Conduit Section of the National Electrical Manufacturers Association, hereafter referred to as N.E.M.A. (Tr. 1363-5; Cx. 691-Z-83 to Z-334).

All of the directorate of R.S.C.A. specified above, exclusive of G. H. Sicard, had been active members of the Rigid Conduit Section of N.E.M.A., which section severed its connection with the old Association by resolution approved by it on April 24, 1934 (Rx. 35-A, B). The following respondents held memberships or were connected with the activities of both N.E.M.A. and R.S.C.A.: Cohoes Rolling Mill Co. (Mohawk); Enameled Metals Co.; Fretz-Moon Tube Co., Inc.; Garland Manufacturing Co.; General Electric Co.; National Electric Products Co.; Steelduct Co.; Triangle Conduit and Cable Co., Inc.; Walker Bros.; Youngstown Sheet and Tube Co.; and Spang Chalfant, Inc. (Cs. 692-A to Z-334 and 3-A, 5-A, 30-B, and 38-A; Tr. 1125). The following respondents appear in the minutes of the R.S.C.A. but not in those of the N.E.M.A.: Clayton Mark & Co., and Laclede Tube Co. (Cx. 5-A and 30-B; 3-A and 5-A; Cx. 38-A; See also Pars. 12 to 30, infra). The R.S.C.A. was dissolved or discontinued as of May 31, 1940 (Cx. 38-C; Par. 48 infra).

(3) Respondent Herbert S. Blake, was at the time of his connection with R.S.C.A., president of Organization Service Corporation, hereafter described. He is a lawyer and a specialist in business organization and management (Tr. 2942-47). He was active in R.S.C.A. from December 8, 1936, when he was present at a meeting and referred to in the minutes as "President and General Counsel, Organization Service Corporation" (Cx. 89, 689, 690). He supervised statistical work, submitted contract forms, and was otherwise active in R.S.C.A. from 1936 to April 19, 1939. From March 9, 1937, Mr. Blake served as president of the R.S.C.A. until he resigned in 1939. (Tr. 2942 to 2954, 2990; Rx. 64, 146; Tr. 3000 to 3141; Cx. 497, 576). (Cx. 13, 14).

(4) Lawrence R. Quinn, vice president in charge of sales for respondent Enameled Metals Company, was active in the Associated Manufacturers of Electrical Supplies in 1920 (Tr. 2076), was in the N.E.M.A. prior to 1934,

and was a leader in the organization of the R.S.C.A. at that time (Tr. 2078-87). He was a director in the last named organization in January, 1938 (Cx. 24-N to P, 27-B) and at other times (Cx. 12-A, and supra).

(5) Respondent Paul Wiess, served as treasurer of Organization Service Corporation for about 20 years. He served as Assistant Treasurer of the R.S.C.A. and did some statistical work in connection with the O.S.C. service. (R. 2495-6, 3121, 3122).

(6) Respondent Robert S. Booth, an employee of O.S.C. since 1933, served as assistant secretary and assistant to President Blake in the latter's work with R.S.C.A. Mr. Booth's name appears as Executive Secretary and Secretary Pro. tem. of R.S.C.A., and as an agency of Organization Service Corporation in various minutes of the Association throughout the series in evidence where Mr. Blake's name is carried. (Cx. 9-B to 28-H). Mr. Booth's duties as an employee of O.S.C. was to serve as Secretary to trade associations operating under its direction. He worked constantly with Mr. Blake (Cx. 34, 22; Tr. 627-30) and succeeded Mr. Sicard as secretary protem and later as Executive Secretary after Sicard's resignation in March, 1936 (Cx. 7a, to 27g). He outlined and operated for the R.S.C.A. a statistical reporting plan conducted investigations into price cutting and reported on specific building contracts (Cx. 9E; 16C, 17D, 20J, 23D to F) Pars. 50 et seq.).

(7) Respondent I. A. Bennett, vice president of National Electric Products Corporation since 1926, was chairman of the Board of Directors of the R.S.C.A. for some time prior to July, 1938, as was a member of said Board at its organization in 1934. He was active in the predecessor organization, N.E.M.A., from 1931 to 1934, and in R.S.C.A. since his resignation from the Board of Directors (Cx. 692, 34-Z, 35-A; Tr. 2574, 2696-2703—Answer Count I, par. 1).

(8) Respondent J. M. Barton, president of Fretz-Moon Tube Company, Inc., since 1929, attended meetings of the N.E.M.A. as representative of his company in 1923 and 1924 (Cx. 692-Z-221, 285, 323) and was active thereafter in the R.S.C.A. from 1935 to 1938, and was a member of its Board of Directors during this period (Cx. 4-A to 39-D; Tr. 1303-4, 1520 to 1522).

(9) Respondent H. G. Morrow was with respondent

Central Tube Company from 1912 to 1940 and in recent years was its vice president in charge of sales. He is now sales manager for Spang Chalfant, Inc. (Answer, Par. 1, Tr. 1299, 1301, et seq.). He was a member of the Board of Directors of R.S.C.A. and was temporary chairman in 1939. Prior to that time he was active in A.M.E.S. and N.E.M.A. (Tr. 1299 to 1306; Cx. 3, 8, 16 to 37-a).

(10) Respondent H. S. Walker, president of respondent Walker Brothers, was an official of both N.E.M.A. and R.S.C.A. (Tr. 828 to 831). He was active in such work of these organizations as related to rigid steel conduit from prior to 1932 to the present time. (Cx. 3 to 42, 692 et seq. Rx. 35 to 50; Tr. 828-835, 1303-4).

(11) Respondent A. E. Newman, manager of the Wiring Materials Sale Department of General Electric Company, appeared as guest from his company at meetings of the N.E.M.A. on February 16 and September 27, 1933 (Cx. 692-Z-239, Z-285), and on February 1 and March 22, 1934 (Cx. 692-Z, 323, Z-332). He represented the company at a joint meeting of manufacturers and the N.E.W.A. on May 20, 1940 (Cx. 42) and at meetings of the R.S.C.A. at various times from 1935 through 1939 (Cx. 2 to 37). At a meeting of R.S.C.A. January 20, 1938, Mr. Newman was elected to the Board of Directors (Cx. 24-U). He is recorded as attended as such at a directors' meeting February 8, 1938 (Cx. 26-B). He says, however, that he
274 never served as Director although he met with the Board on invitation February 8th and March 21, 1938. (Tr. 3685-86, 3687, 3756; Cx. 251; Tr. 1303-4).

Note: Citations in paragraphs descriptive of particular respondents (Pars. 12 to 35) point out some evidence going to connect each with collective activities elsewhere described. Additional references to and further details of the activities of these respondents appear throughout the report. Because of the mass of material produced and received in this case, it is not practicable to refer to all material on a given subject. Throughout this report sufficient references, only, are given to furnish bases for findings which your Examiner finds to be supported by the weight of the evidence contained in the entire record.

(12) Respondent, Central Tube Company, hereinafter referred to as "Central Tube," was from about 1912 to 1940, a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office and

place of business located in the First National Bank Building in the city of Pittsburgh, Pennsylvania. It manufactured rigid steel conduit and sold and distributed the same to and through jobbers, wholesalers and others throughout the United States. (Count I, Par. One of complaint not denied; Tr. 1299-1301). Between 1912 and 1928 the company was represented at meetings of the Rigid Conduit Section, Associated Manufacturers of Electrical Supplies, and thereafter it was represented at meetings of the Rigid Steel Conduit Association (Tr. 1299 to 1301). The corporation was dissolved and the business taken over by the respondent Spang-Chalfant, Inc., about February 1940. (Tr. 1301-2; see statement of counsel and certificate of dissolution of the corporation appearing in the record immediately after the answers.)

Central belonged to the Conduit Section of A.M.E.S. prior to September 20, 1916 and until August 12, 1924 (Cx. 691-F to Z-128). It was a member of R.S.C.A. prior to January 17, 1935, and until February, 1940 (Cx. 3-A to 37-A, Tr. 1301). Central was a member of the N.E.M.A. from March 4, 1931 to March 22, 1934 (Cx. 692, Z-83 to Z-332).

Central's representative attended meetings with competitors and their representatives where pricing and selling policies were discussed (Tr. 1300 to 1305, and Exhibits last above cited).

(13) Respondent Clayton Mark & Company, hereinafter referred to as "Clayton Mark," is a corporation organized and existing under the laws of the State of Delaware, since prior to 1924, with its principal office and place of business located at 1900 Dempester Street, Evanston, Illinois. It sells and distributes rigid steel conduit through jobbers and wholesalers throughout the United States. (Count I, Par. one, complaint and answer, Count II, Par. One of answer; Tr. 1535-38.) Respondent obtained most of its conduit from Youngstown Sheet and Tube Company, Enameled Metals Company, and Fretz-Moon Tube Company (Tr. 1536).

Clayton Mark was identified with the work and meetings of the N.E.M.A. as shown by the minutes of December 1, 1931, January 27, 1932, February 18, 1932, and thereafter (Cx. 692-Z-134, Z-144, Z-158, Cx. 292, et seq.). Clayton Mark's representatives attended the meeting of December 1, 1931 (Cx. 292, Z-134).

Clayton Mark belonged to R.S.C.A. from January 7, 1935 to May 31, 1940 (Cx. 3-8 to 38-A).

Clayton Mark was represented at meetings with competitors where price policies were discussed as shown in (Cx. 11-39 to 42, 689).

Clayton Mark was involved with its competitors in identical bidding as shown by Cx. 344, 347, 348, 318 and 321, and employed the price cards, freight and delivery charge books, and method of calculating delivered prices from basing points as used by its competitors (Answer, Count II, para. 2, 4; Cx. 36, 74; Tr. 1540-3).

(14) Respondent Cohoes Rolling Mill Company, hereinafter referred to as "Cohoes," is a corporation organized and existing under the laws of the State of New York with its principal office and place of business located in the city of Cohoes, New York. It manufactures rigid steel conduit and sells and distributes the same to and through jobbers, wholesalers, and others throughout the United States (complaint and answer, Count I, Par. One; Tr. 1079-82, 3841-31). The conduit business of this respondent was originally conducted by Mohawk Conduit Company whose corporate name was changed to Mohawk Tube Company, Inc., which corporation was merged as of January 1, 1934, with Cohoes Rolling Mill Company which continues to carry on the Mohawk business. Cohoes is also engaged in other branches of the steel business (Tr. 1125).

Mohawk appears as a member of the N.E.M.A. in various minutes from June 4, 1931 to March 22, 1934 (Cx. 692-Z-83 to Z-322). It is also carried as a member of R.S.C.A. in the minutes of January 7, 1935 (Cx. 3-a). Cohoes appears as a member from April 4, 1935, and thereafter to 1940 while Mohawk's name disappears after April, 1935 (Cx. 4-A to 37). Cohoes was a member of N.E.M.A. and R.S.C.A. and attended meetings repeatedly (Cx. 4-A to 37; Rx. 286; Contra. Tr. 3853-4).

For meetings between Cohoes and its competitors whereat prices and policies were discussed, see Cx. 11, 30B, 689-A. Cohoes employed the basing point method and used price cards, freight and delivery charge books similar to those used by its competitors (Tr. 1086 to 1090, 1207; Cx. 73-13, 71-H; answer, Count II, Par. 2).

(15) Respondent Enameled Metals Company, hereinafter referred to as "Enameled Metals," is a corporation organized and existing under the laws of the State of

BLEED THROUGH – POOR COPY

Pennsylvania with its principal office and place of business located in the city of Etna, Pennsylvania. It manufactures rigid steel conduit and sells and distributes the same to and through jobbers, wholesalers, and others throughout the United States. This respondent makes rigid steel conduit at its plant at Etna, Pennsylvania, six miles from Pittsburgh, and ships the same from this point (Count I, Par. One complaint not denied; Tr. 1601-2).

275 This respondent belonged to trade associations as follows:

To Conduit Section, A.M.E.S. from prior to September 20, 1916 to August 12, 1924 (Tr. 691-F to Z-128).

To R.S.C.A. from January 17, 1935 to May 31, 1940, (Cx. 3-A to 38-A), and was a member of N.E.M.A. from 1930 to 1934, (Cx. 692-A-83 to B-332). Through its vice president, L. R. Quinn, Enameled Metals took a leading part in the acitivities of these organizations (Tr. 2076 to 2089).

Enameled Metals was represented at meetings with competitors or their representatives, whereat pricing or selling policies were discussed (Cx. 11, 39 to 42, 558, 689). This respondent was involved with competitors in identical bidding (Cx. 344, 318, 324, 325, 334). It used the basing price formula, price cards, freight adders and contract forms used by its competitors (Tr. 1602-3, 1610, Cx. 674, Par. 42 *infra*, Cx. 700; Tr. 1207; answer, Count II, Par. 4).

(16) Respondent Fretz-Moon Tube Company, Inc., hereafter referred to as "Fretz-Moon," is a corporation organized and existing under the laws of the State of Pennsylvania with its principal office and place of business located in the city of East Butler, Pa. It is engaged in the manufacture and sale of rigid steel conduit which it causes to be sold and distributed, through wholesalers and jobbers, in certain States of the United States other than the State of Pennsylvania where its product is manufactured (Count I, Par. One complaint and answer). Since 1933 this respondent has had a control relation with Steel and Tubes, Inc., to which its output was consigned. Steel and Tubes distributed said stock to the trade. Conduit was shipped from respondent's plant at Butler, Pa. Steel and Tubes is a division of Republic Steel Corporation (Tr. 1407 to 1503). Republic Steel owns half of the stock of Fretz-Moon and National Supply Company owns the other half (Tr. 1502-3).

This respondent is shown as a member of the R.S.C.A. from January 17, 1935 to its dissolution May 31, 1940 (Cx. 3-A to 38-A). The company's president (Par. 8 *supra*), attended meetings whereat uniform contracts were discussed (Tr. 1522, 3417 and 3457-9, Par. 8, *supra*). The company was also a member of the N.E.M.A. from 1930 to 1934 (Cx. 692-Z-3 to 322).

This company was represented at meetings with competitors and their representatives whereat selling and pricing policies were discussed (Cx. 11, 39, 42 and 689). Fretz-Moon's president, J. M. Barton, attended meetings of the N.E.M.A. and the R.S.C.A. and was a member of the latter's board of directors (Cx. 48, 39-B; 692, Z-221 to Z-323; Tr. 1303-4, 1520-1522). These activities were shown to cover periods from 1923 to 1938.

While the product of Fretz-Moon is sold through the Steel and Tube Division of the Republic Corporation, Fretz-Moon set the price, supplied the printed price cards for distribution to jobbers and salesmen, received reports as to market quotations, etc., and sometimes authorized discounts. Fretz-Moon originated all price changes for Republic's conduit business (Tr. 3514 to 3539).

While the minutes of meetings do not show that Steel and Tubes, Inc., was ever a member of the R.S.C.A. they do show that it had "guest" representatives at the meetings from August 4, 1935 to March 11, 1936 (Cx. 4-A to 7-A).

For identical bidding, use of uniform pricing methods, forms, etc., see Steel & Tubes, Inc., and Republic Steel Corporation both of which are reported below (See also Tr. 1504 and Count II, par. 12 of answer, also Cx. 663, 694).

(17) Respondent Garland Manufacturing Company, hereafter referred to as "Garland," is a corporation organized and existing under the laws of the State of Pennsylvania with its office and principal place of business located in the city of Pittsburgh, Pa. It manufactures rigid steel conduit at West Pittsburgh, Pa., about fifty-five miles from Pittsburgh, and sells and ships the said product from that point to and through wholesalers and jobbers situated throughout the United States including the Pacific Coast. It also exports to the Canal Zone and Puerto Rico. From June 13, 1936, until March 26, 1940, the company was in the hands of receivers J. R. Patrick and A. G. Holmes. On the latter date, under provisions of the

BLEED THROUGH – POOR COPY

Bankruptcy Act, the said Patrick and Holmes were appointed trustees. Robert Garland, formerly president of the company, had been manager and trustee since 1936 (Count I, Par. 1, complaint and answer; Count II, Par. One, complaint and answer).

Garland belonged to the A.M.E.S. in 1924 (Cx. 691-Z-119-Z-128) and to N.E.M.A. from 1930 to 1934 (Cx. 692-Z-83 to Z-332) and was a member of the R.S.C.A. from prior to January 17, 1935 to May 31, 1940 (Cx. 3-A to 38-A).

This respondent was represented at meetings whereat price and sales policies were discussed with competitors (Cx. 11, 556, 689). It was involved in identical biddings with its competitors (Tr. 267; Cx. 318, 344, 348) and used the basing point system and the same cards, delivery charge books, and contract forms used by its competitors (Tr. 1479 *et seq.*, 1207, Cx. 382, 662; Pars. 56 *infra*; ans. Count II, Par. 2).

(18) Respondent General Electric Company, hereafter referred to as "General Electric" is a corporation organized and existing under the laws of the State of New York with its office and principal place of business located at No. 1 River Road, Schenectady, N. Y. It manufactures and ships from New Kensington, Pa., rigid steel conduit distributed outright or on a consignment basis through jobbers and wholesalers situated throughout the United States. General Electric Supply Corporation, a wholly owned subsidiary of this respondent, distributes this product as a wholesaler (complaint and answer, Count I, Par. One; Answer Count II, Par. One; Tr. 3603-5).

Respondent General Electric Company belongs to the R.S.C.A. and was represented at many meetings prior to and including November 16, 1939 (Cx. 3-A to 37-A).
276 It belonged to the Conduit Section of the A.M.E.S. (Cx. 691-Z-119 to 121), and also was a member of the N.E.M.A. from 1930 to 1934 (Cx. 692-Z-83 to Z-332). General Electric resigned its membership in R.S.C.A. on July 11, 1938 (Tr. 3684-5), but retained contact with the statistical work of the organization and had "guest" representation thereafter (Cx. 37-A to Tr. 1906, 3697-99).

General Electric was represented at meetings with competitors whereat price and sales policies were discussed (Cx. 11, 39, 42 and 689). (See General Electric Supply Corporation for identical bidding (Par. 28 *infra*).) General Electric used the basing point system (Tr. 3718-24)

and employed similar terms and methods to those of its competitors (Par. 46 and 51 *infra*; Cx. 676, 687; Tr. 473; Cx. 490-D).

(19) Respondent Laclede Steel Company, hereinafter referred to as "Laclede Steel," and respondent Laclede Tube Company, hereafter referred to as "Laclede Tube," were corporations organized and existing under the laws of the State of Missouri with their principal offices and places of business located in the Arcade Building, St. Louis, Mo. On or about December 1, 1936, Laclede Steel acquired the assets, ownership, and business of Laclede Tube Company, a Delaware corporation, one-half interest of which it had theretofore owned. Shortly thereafter the Laclede Tube Company of Delaware was dissolved and the assets taken over by Laclede Steel. Thereafter a nominal corporation was formed under the name Laclede Tube Company under the laws of the State of Mo. This company has not acquired any assets or transacted any business whatsoever but is maintained to preserve the name (Cx. 711).

During the six years last past Laclede Steel has been engaged in the manufacture of rigid steel conduit at Alton, Ill., near St. Louis, Mo. It sells and distributes this product principally through jobbers and wholesalers either outright or on a consignment basis. It ships its product from the place of manufacture to these customers located throughout the United States (complaint and answer, Count I, Par. One; Cx. 711 and Tr. 1752-5).

Both Laclede Steel and Laclede Tube appear to have belonged to the R.S.C.A. at various times in 1935 and thereafter (Cx. 3-A, 6, 10-C, 19-B, 44). Minutes of various meetings of R.S.C.A. for October 30 and December 12, 1935, show Laclede Tube as a member and T. W. Oberhauser as its representative (Cx. 5-A, 7-A). In the minutes of December 8, 1936, and thereafter, Laclede Steel is carried as a member and T. W. Oberhauser as representative. The name of Laclede Tube does not appear in the minutes thereafter (Cx. 9-B and 38-A). Various minutes of the meetings of the R.S.C.A. show numerous entries reciting the absence of the Laclede Steel Co., among other members, from December 8, 1936 to November 16, 1939. In some of these minutes, referred to above, T. W. Oberhauser explained why he could not be present (Cx. 11-B, 14-B, and Exs. cited above).

Both of these companies were represented at meetings

BLEED THROUGH – POOR COPY

with competitors whereat price and sales policies were discussed (Citation as to Tube Cx. 39-A; Tr. 268).

Laclede Tube was involved in identical bidding in 1934 (Cx. 334-355). Laclede Steel was so involved in 1938 (Cx. 324 to 325). It used the basing point system, price cards, delivery charge sheets, contract blanks used by its competitors (Tr. 1765-67, Cx. 59, 77).

(20) Respondent National Electric Products Corporation, hereafter referred to as "National Electric," is a corporation organized and existing, since about 1927, under the laws of the State of Delaware, with principal office and place of business located at Pittsburgh, Pa. Respondent does not manufacture raw pipe but fabricates or processes rigid steel conduit in its plant at Ambridge, Pa. It has a monthly capacity of about 5500 tons. Respondent sells and distributes its product to and through jobbers, wholesalers and others throughout the United States. This respondent has secured raw pipe from National Tube Company (complaint and answer, Count I, Par. One; Tr. 2594-5).

This respondent is acknowledged to be a leader in the industry (Tr. 2582) and not only distributes its product as stated above but also wholly owns American Circular Loom Company, Inc., which is operated under the direct supervision of National Electric's vice president in charge of sales, Mr. I. A. Bennett, (Tr. 2703).

National Electric was a member of N.E.M.A. from 1930 to 1934 (Cx. 692-Z-83 to Z-332), and was a member of R.S.C.A. from January 1935 to 1940 (Cx. 3-A to 38-A; Tr. 2698 to 2703).

Mr. I. A. Bennett, vice president of the respondent, as heretofore shown, was active in the affairs of the association mentioned above, from 1930 to 1940. He was chairman of the board of directors of the R.S.C.A. and also presided over the Association on occasions (Cx. 8 and 14; Par. 7 *supra*).

National Electric was involved in identical bidding with competitors as shown by Cx. 318, 336, 324, 344, 348; Tr. 267).

American Circular Loom Company, Inc., was involved in identical bidding (Cx. 319, 320, 321 and 336; Tr. 266). National Electric employed the basing point system, price cards, freight adders, and exact methods used by its competitors (Tr. 1207, 2620 to 2669; Cx. 664, 807; Pars. 44, 46 *et seq., infra*).

(21) Respondent Steelduct Company, hereafter referred to as "steelduct," is a corporation organized and existing under the laws of the State of Ohio with its principal office and place of business located in the Republic Steel Building, 335 Market Street, Youngstown, Ohio. This respondent buys steel pipe and ships it to Enameled Metals Co., Etna, Pa., where the pipe is fabricated into rigid steel conduit and is sold and shipped by and for Steelduct to and through jobbers and wholesalers located in various States of the United States outside of the State of origin (complaint, Count I, Par. One, not denied in this particular by the answer; Tr. 1391-4).

277 Respondent Steelduct belonged to R.S.C.A. prior to January 17, 1935 and until May 31, 1940 (Cx. 3-A to 38-A). It belonged to A.M.E.S. in 1924 (Cx. 691-Z-119 to Z-126) and to N.E.M.A. from 1930 to 1934 (Cx. 692-Z-83 to Z-332).

This respondent was represented at meetings with competitors whereat price and sales policies were discussed (Cx. 11, 39 to 42, 558 and 689).

Steelduct was involved in identical bidding with various of its competitors as shown by Cx. 318, 325, 347 and 348; Tr. 268. It employed the basing point system, price cards, freight adders, and exact methods used by competitors (answer, Count II, Par. 5; Par. 44 et seq. infra; Cx. 64, 82; Tr. 1392 to 1404, 2113).

(22) Respondent Triangle Conduit & Cable Company, Inc., hereafter referred to as "Triangle," was from the year 1916 to June 1940, a corporation under the laws of the State of New York, with offices at Elmhurst, New York, as alleged in the complaint. On or about June 29, 1940, the said company was merged with Triangle Conduit & Cable Co., Inc., a Delaware corporation, which took over the customers and assets and continued to carry on the business of manufacturing rigid steel conduit in its plant at Moundsville, W. Va., selling and shipping the same from the aforesaid plant to jobbers, wholesalers, and other purchasers located in various States of the United States other than the State of origin. John A. McAuliffe, president of the predecessor corporation, continues as president of the Delaware corporation (Tr. 964-6; complaint and answer, Count I, Par. One).

Respondent Triangle belonged to the R.S.C.A. prior to January 17, 1935 and until May 31, 1940 (Cx. 3-A to 38-A)

BLEED THROUGH – POOR COPY

and to N.E.M.A. from June 1930 to 1934 (Cx. 692-Z-83 to Z-332).

This respondent was represented at meetings with competitors whereat price and sales policies were discussed (Cx. 11, 39 to 42, 558 and 689).

Triangle was involved in identical bidding with its competitors as shown by Cx. 218-321, 334, 719; Tr. 268. It also employed the basing point system contract forms and uniform sales methods used by its competitors (answer, Count II, Par. 2; Cx. 75-B to F, H to U et seq. 669, Tr. 970, 975-79).

(23) Respondent Walker Brothers is a corporation organized and existing under the laws of the State of Pennsylvania since 1912. Respondent's principal office and place of business is in the city of Conshohocken, Pa., where it fabricates or processes into rigid steel conduit raw pipe which it purchases from Bethlehem Steel Mills at Sparrow Point, Md. Respondent sells and ships the said product to its customers consisting of jobbers, wholesalers, and others located in various States of the United States other than the State of Pennsylvania (complaint and answer, Count I, Par. One; Tr. 822-27).

H. S. Walker president of the respondent was prominent in N.E.M.A. and R.S.C.A. as heretofore shown. (Par. 10 supra.)

Walker Brothers belonged to N.E.M.A. from 1930 to 1934 (Cx. 692-Z-83-Z-332) and to R.S.C.A. from some time prior to January 17, 1935 to May 1940 (Cx. 3-A to 38-A).

This company was represented at meetings with competitor whereat price and sales policies were discussed (Cx. 11, 39 to 42, 558 and 689).

Walker Brothers was involved in identical bidding with various competitors as shown by Cx. 318, 324, 325, 719; Tr. 268. It used the basing point system and uniform sales methods employed by its competitors (Cx. 79-Z-23, Par. 39 infra; Tr. 847, 875, 893, 924 et seq; answer, Count II, Par. 3).

(24) Respondent Youngstown Sheet and Tube Company, hereinafter referred to as "Youngstown," is a corporation organized and existing under the laws of the State of Ohio and has its principal office and place of business in the Stambaugh Building, Youngstown, Ohio. Respondent produces a large amount of pipe at Campbell, Ohio, part of which is finished into rigid steel conduit at its plant in Struthers, Ohio. It sells and ships this product from the

said plant, which is sixty miles from Pittsburgh to jobbers and wholesalers throughout the United States located at points outside the State of origin of said shipments. This respondent also sells to Clayton Mark Company, shipping from its Struthers, Ohio, plant to the latter's customers or to Clayton Mark's stocks in Evanston, Illinois (complaint and answer, Count I, Par. One; Tr. 1340-2, 1374-6). Respondent ships anywhere from 300 to 500 tons of rigid steel conduit per month. Prices charged to Clayton Mark Company are less than prices charged jobbers (Tr. 1376-9).

Youngstown belonged to and attended meetings of A.M.E.S. and N.E.M.A. over a period of years and was represented by George L. Holly, sales manager (Tr. 1364 and 1365; Cx. 691, A-119, et seq.).

Respondent belonged to and collaborated with R.S.C.A. from January 17, 1935 to May 1940. At meetings prior to October 1935 respondent had "guest" representatives (Cx. 3-a, 4-a and 5-a). Thereafter it was shown as a member (Cx. 6-a to 38-A).

Youngstown was represented at meetings with competitors whereat price and sales policies were discussed (Cx. 20-24, 39 to 42, 693; Tr. 1363-4 and 1380).

It was involved in identical bidding with competitors as shown by Cx. 318, 321, 344, 348, 719 and employed the basing point system, freight books and uniform methods used by its competitors (Tr. 1342, 1354 et seq; Cx. 73-B, G; 701; Par. 39 (b) and (C) infra; answer, Count II, Par. 2).

(25) Respondent Spang Chalfant, Inc., hereafter referred to as "Spang Chalfant," is a corporation organized and existing under the laws of the State of Pennsylvania with its principal office and place of business located in the Grant Building, Pittsburgh, Pa. Respondent sells and ships 278 rigid steel conduit to and through jobbers, wholesalers and others located throughout the United States other than the States of origin. About February, 1940, Spang Chalfant purchased the business and assets of Central Tube and continued the latter's activities in the manufacture of pipe (complaint and answer, Count I, Par. One; Tr. 1301-2, 4630-1, and 4642).

H. G. Morrow, vice president of Central Tube and Director of R.S.C.A. (see Par. 9) became sales manager for Spang Chalfant. He represented Central Tubes in February, 1940 (Tr. 1301), and thereafter Spang Chalfant appears as a member of the Association. Mr. Morrow did not cease being a director of R.S.C.A. until the date of

BLEED THROUGH – POOR COPY

its final dissolution, May 31, 1940 (answer Par. 1; Cx. 38-A; Contra Tr. 4632, 4654). He resigned the vice presidency of Central Tube, then a possession of Spang Chalfant, as of October, 1940 (answer Par. 1; Tr. 4630-2, 4654).

This respondent was represented at meetings with competitors or their representatives whereat price and sales policies were discussed (Cx. 42; Tr. 1301-6, 1321-6). (For identical bidding see Central Tubes).

Spang Chalfant used the basing point system and uniform methods employed by its competitors (Tr. 1261, 1309-24, 4655 et seq.; Cx. 69-A to D, 98-A to M; Rx. 432; answer, Count II, Par. 8).

(26) Respondent Steel and Tubes, Inc., hereafter referred to as "Steel and Tubes," was an Ohio corporation which, prior to its dissolution in 1939, became the sales agent for Fretz-Moon in the sale of rigid steel conduit. The corporation was dissolved on the third day of October, 1939, prior to the issuance of the complaint in this case, and the business of Steel and Tubes became a division of and was taken over by Republic Steel, which continues to sell the product of respondent Fretz-Moon manufactured at Butler, Pa. (Tr. 1526-8, 1532, 3514-15; Rx. 197; Cx. 65; Motion to dismiss and exhibits thereto appear in the record immediately after the answers).

Prior to its dissolution Steel and Tubes was represented at meetings of the R.S.C.A. from April 4, 1935, to March 11, 1936, by Mr. Murray Whitfield and Mr. William Simpson. These were shown in the minutes as "guest" representatives (Cx. 4-a to 7-a). (Tr. 3418, 3515-3555).

Steel and Tubes was identified in 1935 with identical bidding (Cx. 318 to 339). Both before and after its acquisition by Republic this respondent under the direction and supervision of Fretz-Moon (Par. 16, supra), employed the basing point method of figuring delivered prices and employed other uniform methods used by competitors of itself, Fretz-Moon, and Republic (Tr. 1526 et seq., 3513 et seq.; Cx. 65-A to T; 66-A to D; 85-A to H; Rx. 198, 203 to 209). Subsequent to Oct. 1939, the activities of Steel and Tubes were the activities of Republic with the consent and cooperation of Fretz-Moon. The three names appear on the price cards (Cx. 66-A to D; Tr. 1526-33, 3513-96).

(27) Respondent The M. B. Austin Company, hereafter referred to as "Austin," is and was for about 35 years last past a corporation organized and existing under the laws of the State of Illinois with its office and principal place of

business located at 108 S. Desplaines Street, Chicago, Illinois. It sells and distributes to and through wholesalers, jobbers, and others throughout the United States rigid steel conduit, which it causes to be manufactured for it by respondent Triangle at Moundsville, W. Va., from which this product is shipped as stated above (complaint and answer, Count I, Par. One; Tr. 1657; see Cx. 50-52 for manufacturing contract).

Prior to 1933 Austin was selling agent for respondent Garland and received prices and price cards from Garland. Thereafter Austin bought from and acted as sales agent for respondent. Triangle would then furnish them prices and price cards. Its contract with Triangle provides that they are to sell at the prices furnished but they are to carry their own accounts and take all risks. During the last four years it has bought outright but still secures the freight adder books from Triangle or Donnelly (Tr. 1664, 1676-1680).

Austin was involved in identical bidding with its competitors as shown by Cx. 318, 321, 322 and 324).

This respondent met with competitors whereat prices and policies were discussed (Cx. 39E).

Austin also used the basing point method as employed by its competitors (Tr. 1664 et seq., 1670-73) and used the Donnelly freight adder books (Cx. 386; answer, Count II, Par. 2).

(28) Respondents George L. Hatheway, Regina G. Hatheway, Katherine R. Hatheway, are partners operating and trading under the name and style of Clifton Conduit Company, hereafter referred to as "Clifton," with offices and principal place of business located at 75 Montgomery Street, Jersey City, N. J. They sell and distribute to wholesalers, jobbers, and others throughout the United States rigid steel conduit which they cause to be manufactured for them and to their brands by the respondent General Electric Company. They cause the said product to be shipped from the General Electric plant at New Kensington, Pa., to the aforesaid customers located at various States of the United States other than the State of Pennsylvania (complaint and answer, Count I, Par. One; Tr. 1170-4).

Clifton was involved in identical bidding with several of its competitors as shown by Cx. 341, 731, 733 and 737.

It met with competitors where prices and policies were discussed (Cx. 691-Z).

Clifton's prices are controlled entirely by the prices

BLEED THROUGH – POOR COPY

charged it by General Electric. It changes its cards to conform at all times to the General Electric Company's price cards (Tr. 1172 to 1181).

279 Respondent quotes the Pittsburgh price plus any freight differential from Pittsburgh and observes card prices and uniform methods employed by its competitors (Tr. 1186-90; Cx. 84; answer, Count II, Par. 6).

(29) Respondent General Electric Supply Corporation, hereinafter referred to as "General Electric Supply," is a corporation organized and existing under the laws of the State of Delaware with its office and principal place of business located at 1260 Boston Avenue, Bridgeport, Conn. It is a wholly owned subsidiary of respondent General Electric. It sells rigid steel conduit and kindred products manufactured by the parent corporation and others (answer and complaint, Count I, Par. One; Tr. 3603-6).

This respondent was involved in identical bidding with certain of its competitors as shown by Tr. 267 and 327; Cx. 318, 324, 326 and 344; Tr. 3754 et seq.

This respondent also belonged to N.E.M.A. (Cx. 313; answer, Count I, Par. 3). It used the basing point system and other uniform methods employed by its competitors (Par. 18, supra; see also Tr. 3605 et seq., 3751-55, 3784; Tr. 3606 in connection with Rx. 211).

(30) Respondent Republic Steel Corporation, hereafter referred to as "Republic," is a corporation organized and existing under the laws of the State of New Jersey with its office and principal place of business located in Cleveland, Ohio. It owns 50% of the common stock of respondent Fretz-Moon. In 1939 Republic purchased and took over the business and assets of respondent Steel and Tubes, then the selling agent for Fretz-Moon. Steel and Tubes thereafter became the Steel and Tubes Division of Republic, which Division continued to sell conduit manufactured by Fretz-Moon. (Complaint and answer, Count I, Par. One; Tr. 1526-30, 3514-15; Cx. 65, 66.)

Republic was involved in identical bidding with certain of its competitors as shown by Cx. 719, 359; Rx. 280-Z-14. It met with competitors whereat price and policies were discussed (Tr. 3555) and also advanced to Fretz-Moon a plan for all competitors which would operate to penalize those who gave inside prices (Cx. 572, 573, see also 3557 and Cx. 622).

Republic, through its steel and Tubes division employed the basing point system of pricing, and conformed to other

uniform methods employed by competitors as hereinafter shown (Par. 26, *supra*, Tr. 1528 to 1533).

(31) Respondent Charles Donley is an expert freight rate man and traffic manager with offices in Pittsburgh, Penn. (Tr. 1203-5). In this capacity he served a number of conduit manufacturers by furnishing them original sheets, bulletins, and booklets showing freight rates (Cx. 365 *et seq.* 77-A) for use with delivery charge sheets (Cx. 77-A, 89, 7313, 80-R) in computing delivered prices.

This respondent furnished this service to and through the R.S.C.A. to a list of its members (Cx. 373, 390; Tr. 1207-13). After the service ceased to be furnished as from the R.S.C.A. (Tr. 1219, 1220; Compare Cx. 369, 370) he furnished it direct to the individual companies (Cx. 370; Tr. 1231-33, Cx. 22-D, 241) and advised with a committee of this association and with members as to means and forms of distributing the data (Cx. 401 to 4083, Cx. 377-384; Tr. 1269 *et seq*).

The information that the schedules prepared and distributed by respondent Donley were "to be used as a basis for determining delivered prices," and illustrations of the manner in which they were to be used with the price cards (Cx. 53-70) are clearly stated and shown in the exhibit cited. This material was furnished respondent for inclusion in the schedules (Tr. 1232). He claimed to have no knowledge of the meaning of the instructions (Tr. 1233-43) and that he did not know they were to be used in connection with any prices (Tr. 123-43), but these denials are inconsistent with his experience and the plain statements and implications in the documents he prepared and circulated (see Cx. 365 front cover and page A; Tr. 1203-6, 1233-5; Cx. 401-8).

(32) Respondent Frank C. Hodkinson, who lives in East Orange, N. J., is a member of the bar and has been associated with the Rigid Steel Conduit business since 1897 except from 1936 to 1940 (Tr. 3899, et seq. 3937). In connection with his employment by Garland Manufacturing Company and its predecessor, with American Circular Loom Company (as vice president and general manager), and with Walker Brothers in 1940, this respondent has been active in the work of the A.M.E.S. and the N.E.M.A., and was a member of the Board of Governors of the latter for three or four years (Tr. 3916-22). He belonged to the R.S.C.A. in 1935 (Cx. 367) after serving as supervising agency for the roughing-in-material classification under the N.R.A. Codes (Tr. 3928-32; Rx. 267). Through these duties and

BLEED THROUGH – POOR COPY

associations this respondent is shown by evidence and exhibits to be connected with the pricing methods and other activities hereinafter set out (see also Tr. 3889-3969; Cx. 691-Z to 692-Z-332).

(33) The following conduit producers or sellers, hereafter sometimes referred to as "Conduit Sellers," sold and shipped conduit from their aforesaid places of manufacture and sale to wholesalers and jobbers, or contractors situated in States other than the States of manufacture, and caused their said products to be conveyed in commerce across said State lines, to wit: Central Tube Company, Clayton Mark Company, Spang Chalfant, Inc., Cohoes Rolling Mill Company, Enameled Metals Company, Fretz-Moon Tube Company, Garland Manufacturing Company, General Electric Company, General Electric Supply Corporation, Clifton Conduit Company, Laclede Steel Company, Laclede Tube Company, National Electric Products Corporation, Steelduct Company, Triangle Conduit and Cable Company, Inc., The M. B. Austin Company, Walker Brothers, Steel and Tubes, Inc., Youngstown Sheet and Tube Company.

(Admissions in the answers and elsewhere in the record.)

The aforesaid sellers were in competition with each other in various degrees and at various times with certain
280 modifications and restrictions, as will hereafter appear.

The existence of competition is not denied by these respondents sellers who contend in their pleadings and otherwise that the competition between them is not unreasonably restricted in any way. The Commission's counsel contend that such competition as exists or did exist is unreasonably restricted, restrained, lessened, and injured (see pleadings and statements of contentions throughout the record). The jurisdictional fact of competition, therefore, is not denied. The existence of unlawful restraints and restrictions is the vital issue to be determined from the evidence in the entire record as hereinafter reported on.

(34) Respondent Organization Service Corporation, was incorporated in 1918 under the laws of the State of New York and continues its corporate organization with its office and principal place of business at 74 Trinity Place, in the city of New York. Its officers were and are as follows: Herbert S. Blake, president, Herbert S. Blake, Jr., vice president; N. Myles Brown, vice president; Thomas B. Jordan, vice president; Paul Weiss, treasurer, and C. C. Gregory, secretary (Tr. 2946, answer).

This respondent's business is the organization, reorganization, service, and management of industrial concerns from the financial and merchandising standpoint. Its president is a lawyer, experienced in corporate and industrial matters (Par. 3, supra; Tr. 2946). He states the chief business of O.S.C. to be the servicing of trade organizations such as associations and institutes by furnishing them office facilities, taking care of clerical work in connection with their operation, gathering and disseminating of statistics and by arranging for and assisting in the holding of the meetings of such organizations (Tr. 2947). The president endeavors to keep in touch with decisions of the courts and the action of the Federal Trade Commission and other governmental bodies relating to this work (Tr. 2946-8).

Pursuant to negotiations begun prior to October 29, 1936, the O.S.C. took over the management of the R.S.C.A. "under the direction of its Board of Directors" by contract as of that date. O.S.C. was to furnish all ordinary legal advice and supervisions of usual routine matters, to furnish statistics, clerical, and office facilities, etc. (Tr. 2948-55; Cx. 64-A). This relation between the two organizations continued until December 31, 1938. Thereafter until April 19, 1939, the relation was extended under a special arrangement (Tr. 2238; Rx. 107).

Meetings of the R.S.C.A. after October, 1936, were attended by Herbert S. Blake, N. Myles Brown, and Robert S. Booth and Paul Weiss, all shown in the minutes to be from the O.S.C. Mr. Booth often acted as secretary and was finally elected to that post (Tr. 9-B to 3013). Mr. Blake served as president of R.S.C.A. from March 9, 1937, to April 19, 1939, when his resignation was accepted and the relations between the two organizations were severed (Tr. 2942-54, 2990; Rx. 64, 146; Tr. 3000 to 3141; Cx. 497, 576 and 13, 14). (See also Pars. 3, 5, 6, *supra*).

During the times stated above, these organizations were completely cooperative respecting the matters and activities hereinafter set out. Mr. Blake with his said associates and organization assisted, advised and managed the R.S.C.A. and certain of the latter's members as shown in Cx. 3 to 38 and elsewhere as noted hereafter. These activities included recommendations, discussions, and approval by Mr. Blake and officials and members of the Association of (1) standard forms for consignment and specific building contracts containing clauses to effect resale price control, of (2) methods of contract filing and checking, and of (3) activities to

BLEED THROUGH – POOR COPY

secure cooperation of members of the jobber Association (Cx. 577-A, B). These joint activities also included discussions and advice on matters involved in price stabilization and price policies (Cx. 11, 24, 559, 576-A to E, and *supra*), the further details of which will be discussed in subsequent paragraphs.

In addition to the activities outlined above, the O.S.C., the R.S.C.A., and other organizations of the Conduit industry, named herein, gave considerable attention to scientific research and other work directed to the standardization, promotion, and improvement of their product (Cx. 1-A, 3-B, 4-B, 5-B, Item III, 6-B, 7-B, 9-C, 10-C, 11-D, and 12 to 42).

(25) Respondent National Electrical Wholesalers Association, referred to herein as N.E.W.A. is an unincorporated trade association of numerous wholesalers and jobbers located in the various States of the United States and who are engaged in the purchase and wholesale distribution of electrical supplies, including rigid steel conduit, in interstate commerce. The principal place of business and offices of the said Association are located at 165 Broadway, New York, N. Y. (answer pp. 3 and 4). The purpose of the organization is to deal with problems of distribution as they relate to electrical wholesalers, to gather and disseminate information thereon, and to provide an opportunity for members of the industry to meet, exchange views, cooperate in patriotic activities, etc. (Tr. 4971-2).

Representatives of the various wholesale membership who were officers and Committee members of N.E.W.A. at various times covered by the complaint are as follows:

E. Donald Tolles, Managing Director,
Alfred Byers, Secretary and the
following members of the Committee:

L. E. Latham, D. L. Fife, W. J. Drury, A. H. Kahn, F. R. Eiseman, W. S. Blue, C. H. McCullough, H. E. Rasmussen, H. O. Smith, W. R. Kiefer, H. B. Tompkins, A. L. Hallstrom, A. S. Reichman, and D. M. Smith.

(Answer of N.E.W.A. pp. 4, 5; Cx. 39 B to E, Rx. 270).

281 The membership of N. E. W. A. numbers approximately 200 which includes chains as a unit and represents about 500 wholesale houses. This membership covers practically every State in the Union in which there are about 3,000 electrical wholesalers (Tr. 3970-75). The following, referred to in the complaint as "respondent con-

duit wholesalers," are among the numerous membership of this Association with organization and location as stated:

1. General Electric Supply Corporation, a corporation organized and existing under the laws of the State of Delaware with its office and principal place of business located (insofar as such business relates to jobber distribution of "conduit") at 585 Hudson Street in the city of New York, N. Y. (Par. 29, supra).

2. E. B. Latham & Company, a corporation organized and existing under the laws of the State of New York with its office and principal place of business located at 250 Fourth Avenue in the city of New York, N. Y. It was involved in identical bidding with its competitors (Cx. 347, 348, 320, 321, 324-5). Through its president, Mr. L. E. Latham, it was involved in meetings with manufacturers and competitors whereat pricing policies were discussed and action taken thereon (Tr. 4298 et seq.; Cx. 39, 40, 41, 48). This respondent employed the basing point system and uniform methods with its competitors and received and sold conduit on the consignment plan (Tr. 4300-4317, 4350 to 4418; see also Cx. 290, 737, 739, 740; as to membership in N. E. W. A. Cx. 313 to 317).

3. Fife Electric Supply Company, with office and principal place of business located at 541 E. Larned Street in the city of Detroit, Mich. It was represented by Mr. D. L. Fife at meetings with competitors whereat pricing policies were considered (Cx. 39 to 42, 48; Rx. 270).

4. Columbian Electric Company, 206 Grand Avenue, Kansas City, Mo. It was represented by Mr. W. S. Blue on N. E. W. A. Committee in discussions of sales policies with manufacturers and competitors (Cx. 39-D, 48).

5. Graybar Electric Company, Inc., a corporation organized and existing under the laws of the State of New York with office and principal place of business located at 420 Lexington Avenue in the city of New York, N. Y. It was represented by Mr. W. J. Drury, vice president, on N. E. W. A. Committee in discussions of sales policies with manufacturers and competitors (Cx. 48, 39-D, E, 40-A). It employs the uniform sales methods used by its competitors (Tr. 4182 to 4297). It was involved in identical bidding (Cx. 318 to 344). Graybar also used the pricing system (Tr. 4242).

6. W. T. McCullough Electric Company with offices and

BLEED THROUGH – POOR COPY

principal place of business located at 317 First Avenue in the city of Pittsburgh, Pa. It was represented by Mr. C. H. McCullough on the N. E. W. A. committee in the discussions set out above (Cx. 39-C, D, 42, 48; Rx. 270).

7. Peerless Electric Supply Company with office and principal place of business located at 122 South Meridian Street in the city of Indianapolis, Ind. It was represented by Mr. H. E. Rasmussen in the N.E.W.A. Committee activities described above (Cx. 39 to 42, 48, Rx. 270).

8. The Hardware and Supply Company, with office and principal place of business located at 475 South High Street in the City of Akron, Ohio. This respondent was represented by Mr. H. O. Smith on the N. E. W. A. Committee activities heretofore described (Cx. 39 to 42, Rx. 270). It also received the price cards used by manufacturers and competitors and followed them a part of the time (Tr. 4438-40; see also Tr. 4419 to 37).

9. Revere Electric Company, a corporation organized and existing under the laws of the State of Illinois with office and principal place of business located at 757 W. Jackson Street, in the city of Chicago, Ill. It was represented by Mr. F. R. Eiseman on the N. E. W. A. Committee activities described above (Cx. 39 to 42, 48, Rx. 270) and at a manufacturers meeting where profit or commission margins for wholesalers and consignment arrangements were discussed by manufacturers and wholesalers (Tr. 1696-8, 4454-56; 4460-5). Revere handled some conduit on consignment (Tr. 4453) and followed the price cards and pricing methods (Tr. 4447-72).

10. Kiefer Electrical Supply Company, a corporation organized and existing under the laws of the State of Illinois with office and principal place of business located at 318 South Washington Street in the city of Peoria, Ill. This respondent was represented by Mr. W. R. Kiefer in the N. E. W. A. Committee activities (Cx. 39 to 42, 48; Rx. 270).

11. Westinghouse Electric Supply Company, a corporation organized and existing under the laws of the State of Delaware with office and principal place of business located at 150 Varick Street in the city of New York, N. Y. It was involved in identical bidding with its competitors (Cx. 318, 320, 325; Rx. 292, 293) and was represented in the aforesaid N. E. W. A. Committee activities by Mr. H. B. Tompkins (Cx. 39 to 42, 48; Tr. 4482-5). Westinghouse

took some conduit on consignment and conformed to the basing point pricing methods (Tr. 4475 to 4559).

12. F. D. Lawrence Electric Company, with office and principal place of business located at 217 West Fourth Street in the city of Cincinnati, Ohio. It was represented on the Conduit Committee of N. E. W. A. by Mr. A. S. Riechman (Cx. 48, Rx. 270; see also Cx. 313-17).

13. The C. S. Mersick and Company, with office and principal place of business located at 278 State Street in the city of New Haven, Conn. This respondent was represented on the Conduit Committee of N. E. W. A. by Mr. D. M. Smith (Cx. 48; Rx. 270, see also Cx. 313-17).

The members of the said N. E. W. A. named in this paragraph, hereinafter referred to as "Conduit Wholesalers," and taken as representative of all of the members thereof, are each in competition with one or more of the others, except as trade rivalry may be modified, restricted, or hindered by methods employed by them. The sales distribution by the said conduit wholesalers of rigid steel conduit is in commerce, in, between, or among the various States of the United States. (Answer, of N. E. W. A. Count I, Par. 3; Rx. 280-A to Z-18). Respondents Rigid Steel Conduit Association, National Electrical Wholesalers Association, Organization Service Corporation, their of-
282 ficers and committee members, and other individual respondents mentioned in the complaint are shown throughout the record to be effective instrumentalities in the aforesaid trade and commerce.

(36) Rigid Steel Conduit, hereinafter referred to as "Conduit," is the commodity produced by the aforesaid manufacturers and with which this proceeding is concerned. It is used as raceways especially prepared for pulling in or withdrawing wires or cables after the conduit is in place. It is made of milled steel pipe that has been cleaned of scale and rust and has been given enameled, galvanized, or metallic coatings to resist corrosion. The galvanizing or enameling is for the purpose of producing smooth surfaces so that when it is used as raceways the electric wiring may be drawn through it with facility and without injury to the insulation. These metal pipes are connected with the ground so as to carry off electric current safely in case of a short circuit. Conduit is usually placed in buildings as part of the roughing-in process during the course of construction. The electric wiring may be drawn

BLEED THROUGH – POOR COPY

through it at any time thereafter. Conduit is produced in the United States by eleven manufacturers. Seven of these have plants located at or near Pittsburgh, Penn. The others are situated at Conshohocken, Penn., Cohoes, N. Y., Indiana Harbor, Ind., and St. Louis, Mo. (Tr. 2050 to 2057). (As to product volume see Rx. 32-A to D and Tr. 2070).

Conduit is sold in 10-ft. lengths with threads at both ends of each piece and these are made into continuous pipe by the use of elbows or couplings. One coupling goes with each length. It is made to inside measurements from ¼" to 6". Conduit is made from the raw pipe furnished by various steel mills. This pipe is polished and conditioned by the respondent manufacturers in such a way that there is very little difference between the weights of the raw unscaled pipe and the finished article which is covered with enameled or galvanized coatings (Tr. 2023-2052; Rx. 23 to 28). Conduit must conform to certain minimum standards described by Underwriters Laboratories. This is necessary to meet insurance and other requirements (Tr. 2037 to 2044). Conduit must also meet standards of the Architects' Institute and Government specifications (Tr. 2058-60).

In recent years volumes exceeding 125,000 tons of conduit have been sold and distributed annually by the respondent sellers (Tr. 2070 and Rx. 32-A to D). Respondent's conduit is sold in the entire continent of the United States and in its possessions. It is also sold for export to South America, the West Indies, the Orient, Canada, and Mexico (Tr. 2063; see Tr. 2074, for percentage in certain cities and sections).

(37) All respondents heretofore named were shown to be involved or connected with one or more features of collective activity in the particulars and to the extent heretofore cited. The nature of these activities with respect to conspiracy, agreement, understanding, and collusion, and with respect to trade restraining effects of such activities and others which may be disclosed, will appear more fully from the circumstances, statements, and activities hereinafter set out.

(38) For several years prior to 1941, respondents conduit sellers generally quoted and sold conduit at delivered prices derived from a base price plus certain freight "adders" which vary approximately with the differences in freight between quoted points and a controlling basing point. Conduit quotations were based on Pittsburgh, Pa.,

Evanston, Ill., of Chicago, Ill., but in recent years, there have been only two bases, Pittsburgh and Chicago. Prices quoted or charged by this method included freight from one or the other of these basing points to the point of delivery regardless of where the shipments originated. Sellers located at a basing point received the same mill net on all sales to points where the combination of its base plus freight adder is the controlling or low price. Others shipping into this territory meet, or equal the basing mills' price, and in so doing they either "absorb" freight or secure "phantom" freight.

Freight is absorbed when more freight is paid on the shipment than was included in the price, or freight from the basing point to the point of delivery. This absorption reduces the seller's net by the excess of actual freight over basing point freight. "Phantom" freight is secured when the actual freight is less than the freight included in the delivery price (freight from basing point to delivery point). "Phantom" freight increases mill or seller's net by the excess of basing freight (included in the price and therefore collected from buyer) over actual freight prepaid by shipper or deducted by the purchaser. By this method all sellers who ship into territory where prices are based on a point other than their own, would either absorb freight and receive a lower net or would receive a larger net through the receipt of "phantom" freight.

The basing point method operated to prevent purchasers located near the non-basing conduit selling point from securing price or delivered cost advantages over purchasers located further from said shipping points (Tr. 1484 et seq), and it also prevented purchasers from making savings in delivery expense by using their own trucks or other means of transportation cheaper than rail or from saving by diverting rail shipments in transit. (See Pars. 39 and 40 and citations there made; Tr. 1542-3, 1604-10, 1668-73, 1670, 1770-3, 3815-20.)

(39) Respondents employed the foregoing method of figuring prices in the process of "meeting competition," matching prices, or, as some witnesses expressed it, of selling at the market price, the market being considered to be the place of delivery. (See Individual citations, also Par. 54, infra.) Respondent wholesalers were required to employ the pricing methods of the manufacturers as indicated by the contracts, price cards, freight books, and delivery

BLEED THROUGH – POOR COPY

charge books cited and described below. (See also Tr. 1598-9.)

Freight factors had the effect of introducing deviations in final delivered price quotations, since the official freight tariffs were often changed and also were quoted in hundred weights while conduit was quoted in 100 or 1,000 feet (Cx. 53-D). The conversion involves fractions which are sources of deviations. Tariff schedules are complicated and it is improbable that different sellers taking rates from official tariffs and figuring independently could arrive at identical freight charges so as to produce identical delivered prices. The result of independent figuring would
283 be variations in delivered price quotations at given points (Tr. 1797 to 1799, 1846-50).

The method employed by respondents rendered exact quotations possible for all sellers. It involved the use of (a) price cards containing base prices (Cx 53 to 70), (b) freight rate books and bulletins (Cx. 73-C, 370 to 372), and (c) delivery charge books (Cx. 73-B).

(a) The price cards contain lists of net base prices per 100 feet of the various sizes of conduit and net base price per 100 couplings and elbows of the various sizes. A separate sheet is made out for each base, and the entire card is given a serial number as well as a date (Cx. 53-Z 26 to Z-29). The last sheet of this exhibit Card 78 issued by Cohoes, contains an illustration and complete instructions for figuring delivered prices by use of the freight rate and delivery charge factor, as follows:

"Prices in this sheet, are net prices Pittsburgh or Chicago Basing, and to determine delivered prices, freight per 100 feet, as shown for each given size of conduit, or 100 pieces for couplings and elbows, must be added to the net basing point price. See freight Rate Bulletin for freight rates and then refer to delivery charge book to determine delivery charges for each respective freight rate.

"Example ½" Indian Black Enameled Conduit Delivered

New York City Carload Shipments.

	Carloads
Pittsburgh Base	$4.27
Delivery Charge—36¢ Carload Rate	.32
Price per 100 feet net f.o.b. cars New York, N. Y.	$4.59

"Terms: 5% cash discount 10th proximo on net delivered price, immediately thereafter net.

"All prices subject to immediate acceptance and subject to change without notice.

"Freight adder books giving net additions to cover transportation will be supplied on request."

(Cx. 53-Z29). In the example quoted, the base price is taken from card 78 (Cx. 53-Z27), the freight rate of 36¢ per 100 pounds, carload rate, is shown in the then current freight book, Cx. 73-G, page 6, and the conversion from 36¢ per 100 pounds to 32¢ per 100 feet is made in Cx. 73-B, page 7, Column 13.

New price cards appeared from time to time issued under serial numbers by one or the other of the sellers. Shortly after a card appeared the other sellers would issue cards with the same prices and serial number. On occasion a seller has omitted to issue a new card and sold at the fixed discount from the old card reflected by the new issue (Tr. 842, 903, 2150). Sometimes old cards were used as price bases on some occasions (Tr. 970, 1147-B, 2154, Par. 53; Cx. 629).

(b) The freight rate books and bulletins were prepared by respondent Donley and distributed to various respondents at one time pursuant to arrangements with R.S.C.A. and at other times by direct transactions with members of the Association (see Par. 31 supra and citations, also Cx. 24-F). They contain no adequate routing or other shipping information except the lowest rate as shown by official tariffs (carrier not named) between the basing points and various locations throughout the United States (Cx. 73-C, 697, 698; Tr. 1212-31). These were furnished to respondent sellers by Donley for distribution by them to wholesalers and salesmen. Numbers of copies taken by the sellers ranged from 110 for Laclede to 2200 for Youngstown (Cx. 373, 390; Tr. 847, 1207-10). The rate books state plainly that the information is "to be used to ascertain delivery charges in figuring f.o.b. destination prices to all points ....." (Cx. 372, p. 2.)

(c) The delivery charge books contained the freight "adders" or exact amount to add to basing prices in order to determine without minor deviations the delivered price at a given location. These "adders" are the freight items for given quantities after the conversion from hundred weights to hundred feet of conduit has been made and after 5 percent of said converted freight has been added thereto. This percent equals the cash discount allowed customers

BLEED THROUGH = POOR COPY

on the entire delivered price, and is stated to be for convenience in calculating (Cx. 77-A, 75-B, p. 2).

Practically the same information as that contained in the delivery charge brackets appears in National Electric's booklet entitled "Freight Adders and Terms," dated June 10, 1930 (Cx. 80-R), but Youngstown's booklet, "Delivery Charges—" Nov. 15, 1930, drops the confusing use of key numbers and gives the adders in connection with ½¢ gradations in freight per 100 lbs. (Cx. 89). This book was furnished to other respondent sellers and used by them until about January 1, 1938, when it was revised by Youngstown and thereafter used by other conduit sellers (Cx. 73-B).

The following conduit sellers were shown to have used one or the other of the books: Cohoes, Triangle, Walker Brothers, Enameled Metals, Steel and Tubes, Fretz-Moon, Garland, Clifton, Clayton Mark (Cx. 74), Spang-Chalfant (Tr. 432-3). General Electric's pricing material appears to be identical in material respects (Cx. 71, 72).

(40) Respondent sellers, according to their own statements, made sales at the prices announced on the cards in the conduct of a substantial percentage of their business. These percentages ranged from 32% or 33% low mark for General Electric Supply Corporation (1939-40), to 96% for Republic in 1938 (Tr. 3835-41, Rx. 206-B, 284 see also Rx. 204 to 208-C; Rx. 242, Tr. 4121-30). These "off card" prices were not broken down to show proportions of total which were below quoted prices. Many sales were made at prices which were above the card quotations (Rx. 290; Tr. 4364), and the evidence is substantial to the effect that from 70% to 87½% of the rigid steel conduit sold by the industry was sold at or above respondent sellers' price card quotations and delivered prices figured thereon by the basing point method and factors heretofore described. (Cx. 39-D, 496, 579; Tr. 673, 1129, 1155, 1405, 1460, 1694, 1700.)

Respondents' uniform methods operated to produce identical bids for supplying conduit on many U. S. Government requirements. One proposal from the Panama Canal produced thirty-two identical bids ($8,188.90) out of a total of thirty-three (Cx. 318). Similar results were shown from invitations requiring conduit for various Naval stations, including Pearl Harbor, and for other deliveries to the Canal Zone (Cx. 319 to 348). The same experience was met with by a local project, the School District of Phila-

delphia, where fourteen bidders quoted the "correct price" while five others were lower and had to be investigated (Par. 51; Cx. 489, 490). As a general practice, if not an invariable rule, respondents bid delivered prices and "on the card" to governmental agencies. One reason advanced for this was that the bids are made public and every dealer would naturally bid his company's price (see Tr. 893, 2210, 2460-3). A manufacturer also felt under a certain restraint, as he did not want his dealers to learn that he had cut prices (Tr. 2825-8). Results of biddings were tabulated and reported by salesmen and others and sometimes circulated for the information of competitors (Par. 51; Cx. 489-C, 520-A; Rx. 224, 236 to 241-A; Tr. 4762). (See also Par. 54.)

(41) All respondent sellers sold conduit on a stock consignment plan effected by contract between the sellers and wholesalers (Tr. 2972, 3474). Contracts in evidence referred to the wholesalers as appointed "distributors" (Rx. 195), appointed "Exclusive Selling Agents" (Rx. 196), "duly authorized distributor" (Rx. 198), "Agent" (Rx. 211), and "non-exclusive agent" (Cx. 51), (see also Cx. 665 and 673; Tr. 472 et seq.).

These contracts provided for the consignment of conduit to the distributors who were to sell out of said stocks, reporting the sales on specified days of the succeeding month, guaranteeing payment on all sales, and remitting therefor. Sales were made at prices and terms named by the manufacturer who prepaid freight on the consignment and allowed the wholesaler a sales commission. The manufacturer also shipped direct to the purchaser on the wholesaler's order on the same terms and conditions as if the sale had been made from the consigned stock. Some of these earlier contracts were exclusive and the terms and conditions varied in material particulars (see exhibits last above cited).

(42) Prior to and during the N.R.A. Code period respondent manufacturers sold outright to some wholesalers and jobbers while consigning stocks to others who often bought to their own account from the consigned stocks to the disturbance of prices after an increase (Tr. 1710-12, 2598, 3474). Some contracts prohibited such withdrawals (Cx. 211). Difficulties arose under N.R.A. over the failure of some distributors to maintain the filed prices. Mr. Hodkinson, of the Supervising Agency, maintained that agents

BLEED THROUGH – POOR COPY

selling from consigned stocks could be controlled in this respect and that under other conditions resale prices could not be regulated (Cx. 91). Complaint was made in this matter against Youngstown charged with responsibility for price cutting by Westinghouse, a distributor. Youngstown officials took the position that they could not fairly discipline the consignment jobber until the purchasing wholesaler, with whom the consignment jobber was in competition, could be controlled and until manufacturers acted as a group (Cx. 91 to 95, 187). At that time all prices and terms were filed with the Supervising Agency under N.R.A. and price cutting by wholesalers and others was reported, investigated, and discouraged by Mr. Hodkinson and the agency with the cooperation of respondent manufacturers (Cx. 119 to 285).

(43) After the Code period the matter of resale price control and uniform consignment contracts was the subject of conferences between the Conduit Committee of the wholesalers organization, N.E.W.A., and representatives from respondent manufacturers hereafter to be referred to as the "joint committee." At a meeting on September 28, 1936, the Committee went on record as follows:

"Inasmuch as several manufacturers have expressed the opinion to various members of the Committee that the Conduit Industry can be placed on a sound economic and service basis only by Wholesalers acting as agents for the manufacturers, with consigned stocks, your Committee is of the opinion that this Association should recommend that the Conduit Manufacturers consider the advisability of selling conduit on a consignment basis."

(Cx. 39-A) About this time the manufacturers association, R.S.C.A. was becoming active in the matter of uniform business methods (Cx. 4, 8, et seq.). At a meeting of the Board of Directors, November 20, 1936, the minutes disclose that "the day was spent in going over the Uniform Sales Agency Contract which had been submitted to the Industry by Counsel" * * * (Cx. 8-B). These minutes were approved by the R.S.C.A., at its meeting December 8, 1936, at which the Organization Service Corporation and Herbert S. Blake, president and general counsel, were functioning as heretofore stated (Par. 34 supra). Mr. Blake, as counsel for the R.S.C.A., made a study of the consignment contracts in use by various members of the industry and drafted a new form for all manufacturers to

use (Cx. 662-4; Tr. 472). He urged uniformity in this respect and advised the members that if they were going to have a variety of intermediaries they should set up some form of price control so that they would not violate the Robinson-Patman Act (Tr. 2962-4, 2970, 3097). But the desire of the manufacturers for a uniform contract had preceded the aforesaid advice and the promulgation of the Robinson-Patman Act (June 19, 1936), for the R.S.C.A. on April 4, 1935, appointed a Committee to consider the matter of a Sales Agent Contract (Cx. 4-B). The consignment contract was completed by Mr. Blake after
285 submitting tentative drafts to the individual members for criticism (see Rx. 146 to 148-D; Tr. 2970 to 2986; Cx. 574, 575). The finished form, Commission's Exhibits 662, 663, 668-70, was sent out to various members (Tr. 639 to 647). They were used thereafter, with no substantial changes, by Garland (Cx. 662), Steel & Tubes and Fretz-Moon (Cx. 663, 694), National Electric (Cx. 664), Austin (Cx. 668), Triangle (Cx. 669), Cohoes (Cx. 670), Enamel Metals (Cx. 674), Spang Chalfant (Cx. 673), and others (Tr. 1523, 1713-14, Par. 44).

(44) This consignment contract was part of a new marketing plan or system which began to take form some time prior to November 20, 1936, on which date the Board of Directors of R.S.C.A. met and spent the day considering a Uniform Sales Agency Contract. The minutes of that meeting (Cx. 8-C) states as follows:

"It is the intention of the Board of Directors to try and have in the hands of the members a Uniform Jobber Agency Contract, a Uniform Specific Building Contract, and a set of Fair Trade Practice Rules for consideration of the Association at its next meeting to be held Tuesday, December 8, so that the Industry, if it so desires, could put these uniform instruments in operation by our next period, namely, December 25." (Cx. 8-C.)

On November 30, 1936, respondent Blake as president and counsel of the Organization Service Corporation sent out to members of the R.S.C.A. a second draft of the Consignment Agency Agreement, heretofore mentioned, and referred to other material to be forwarded as follows:

In order that individual manufacturers in the Rigid Conduit Industry may be able to meet competition, and, at the same time, protect themselves as against possible infringe-

BLEED THROUGH – POOR COPY

ment of the provisions of the Robinson-Patman Bill, it has been suggested that it is desirable to provide:

(a) An uniform form of Consignment Agency Agreement—

(b) An uniform form of "Protective" Contract covering special jobs—

(c) An uniform form of contract with manufacturers' agents—

(d) Suggestions for applicable provisions should be incorporated in price sheets and other sales data—

(e) Suggestions for uniform business practices—

"The uniform form for Consignment Agency Contract is enclosed herewith. The other forms will be sent you daily in succession in order that you may study them carefully and be prepared to take action thereon for the meeting to be held Tuesday, December 8.

"Will you please bring with you all papers sent you in connection with the above matter in order that you may be able to mark copies to assist you in an informative and constructive discussion." (Cx. 574-A, B).

The suggestions for a uniform purchase or job contract followed on December 1, 1936 (Cx. 575).

(45) Prior to this activity a conduit committee of the N.E.W.A. met with manufacturers' representatives on September 28, 1936, discussed and recommended: (1) limiting by the manufacturer of building contracts to one car load of conduit, (2) adopting means to determine the actual amount of conduit required, (3) establishing a bureau to prevent duplication of contracts on the same job, and, among other recommended steps, (4) selling conduit on a consignment basis. Central Tube, Fretz-Moon, Laclede, National Electric, Triangle, and Walker Brothers were shown as manufacturers present at this meeting. (Cx. 39-A.)

At the meeting of R.S.C.A. on December 8, 1936, Mr. Blake spoke on the probable effect of the Robinson-Patman Act on business generally and outlined the "general merchandising procedure" which he said he felt manufacturers would have to adopt. He outlined the progress being made in the study of the general merchandising procedure of the industry. He requested discussions on features of his remarks and promised a written report with recommendations within a few days. The minutes of the Directors' meeting of November 20, 1936, were approved (Cx. 9-D-E).

At a special meeting called for the purpose, which met on December 30, 1936, the R.S.C.A. considered the "recommendations relative to the Distributor Agents' Contracts and other suggested forms submitted by Mr. Blake in order to enable the manufacturer to adopt them without further delay if they cared to do so." Suggestions were made and considerable discussion on the various forms was had (Cx. 10-D). Question was raised to the legality of adopting these contracts, and Mr. Blake advised that it would be all right if one member adopted a contract and other members announced their adoption following the one member, so long as they did not agree to adopt it (Tr. 1896).

At the regular meeting of the R.S.C.A. held at the Hotel Biltmore, New York, N. Y., on January 27, 1937, Mr. I. A. Bennett made a statement for himself and for his company, National Electric Products Corporation, in which he referred to the employment of the "Organization Service Corporation with its legal talent to direct us and function for us in all our collective interests" and mentioned the study and recommendations and established procedure "for eliminating fraud and sharp practice." Mr. Bennett then stated that he had established a policy for his company and would operate under it "until such time as competitive conditions make it necessary to change." He said he would announce this policy to his sales department, customers, and competitors at the same time, and that he asked no competitor to follow it and would enter into no agreements or allow them to be made with competitors (Cx. 11-F, G, H).

286 (46) National Electric's new method of merchandising referred to by Mr. Bennett, which included contracts and other forms, was mailed to its distributor "customers" thereafter to be called "Distributor Agents," on February 10, 1937, to become effective February 15, 1937 (Cx. 580, 581, 587). On March 30, 1937, Mr. Bennett wrote concerning the "New Merchandising Plan" that "we believe it is going to be the accepted method of merchandising conduit, and that within a small percentage all of the conduit sold in the future will be on this basis" (Cx. 585-B). On May 23, 1938, Mr. Bennett, writing to "distributor agents" said that he had not found competitive conditions of a nature to warrant a change in the plan of merchandising (Cx. 600-B).

Respondent Garland appealing to its "Distributor Agents" to "help us maintain our price structure" says

BLEED THROUGH = POOR COPY

in a circular letter dated June 8, 1938: "Our merchandising plan, put into effect a year or so ago, has met with the approval of manufacturers, jobbers and contractors. It has proved to be a good and workable plan, and if properly carried out, will give more profit to all" (Cx. 556). This plan was accepted and generally carried out by respondent sellers and was considered for a time to have a stabilizing effect on prices through control of the "secondary" market. By the end of 1938, however, according to Mr. Blake, the machinery was weakening by reason of the failure on the part of the distributors to give the plan their wholehearted and unqualified support." Mr. Blake also described the failure of continued success of the plan to (a) failure of producers to maintain their "published market position" and (b) to market decline (Cx. 576-A, B). (As to uniform job contracts, terms and general acceptance of the Blake merchandising plan, see Cxs. 676 to 681, 684 to 688, 693 to 696, 662 to 666, 668 to 670, 672, 673, 533, 538-B, 577, 694; Rx. 145 to 148).

(47) In employing the merchandising plan some sellers deviated from the most prevalent forms, such as Cx. 662, 664, consignment contracts, and Cx. 676, 677, specific job contracts, but such changes do not appear to alter essential features so far as they might be employed to effect uniform requirements for price control and contract checking. (see Cx. 687-B, Tr. 473, Cx. 676-7, for General Electric deviations; Cx. 686-A, D, re Spang-Chalfant; also Cx. 685, 686-C, 664-B for other cases). The new consignment contracts were said by Mr. Quinn, Enameled Metals, to settle definitely the contract-jobber problem which had been a disturbing factor in the industry for years (Tr. 2267; Cx. 662-A, in the first "whereas"). Although they refer to the wholesaler as the "Distributor Agent" of the manufacturer, there are no terms creating exclusive relations (Cx. 662 to 667), and respondents' practices under these agreements were such that a wholesaler sold from four to six different brands at the same time. This wholesaler, Graybar, had consignment agreements with all manufacturers, except Triangle which sent its price cards. No action was taken by the N. E. W. A. to enforce the agreements except by way of recommendation to the R. S. C. A. as hereinafter shown. (Tr. 4234 to 4246). Latham carried different mill stocks simultaneously and had agreements with two manufacturers and had others during recent years (Tr. 4370).

(48) The resignations of Mr. Blake and Mr. Booth were accepted by the R.S.C.A. as of April 1, 1939, and the Association's contract with Organization Service Corporation was abrogated as of the same date (Cx. 35-B). The R.S.C.A. was discontinued by resolution as of May 31st, 1940 (Cx. 38-C). Prior to these changes and to the Blake letter of December 23, 1938 (Cx. 576), referring to certain features of failure in the merchandising plan and recommending steps to remedy the same, the Conduit Committee of N.E.W.A. met with eleven of respondent manufacturers on October 18, 1938, deplored the setback to the Sales Agency Plan, and went on record as favoring the continuation of the plan as the basis of the Conduit Sales Structure. The meeting also approved 15% and 20% minimum wholesalers' margins as on card 78, and renewed previous recommendations that price advances be limited to steps of not more than 5% (Cx. 39-E). The same committee, meeting on May 22, 1939, reported it as the "definite desire of both industry groups that the (sales agency) plan be retained as a basis upon which to build a more satisfactory sales picture in connection with our conduit business." This meeting refers to the 15% and 20% wholesalers' differentials as being followed and repeats its recommendation for the 5% limit on price advances (Cx. 40-C). The report of October 17, 1939, of the same committee repeated its previous action as to the agency plan and the 5% price advance limit, but recommended wholesaler differentials of 17% to 22% (Cx. 41-A, B). In May, 1940, the committee was still discussing the agency plan (Tr. 1614 *et seq;* Cx. 42). The following manufacturers were represented at one or more of the joint committee meetings referred to in this paragraph: American Circular Loom Co., Inc., Central Tube, Enameled Metals, Fretz-Moon, General Electric, Steelduct, Steel & Tubes, Triangle, Walker Bros., Youngstown, M. B. Austin. The following wholesalers' representatives attended: L. E. Latham, W. J. Drury, T. R. Eisman, D. L. Fife, W. R. Kiefer, H. B. Tompkins, R. L. Brown (for J. S. Schmidtbauer), B. T. Hare, T. C. Treadway, and C. H. McCullough, (Cx. 38 to 42).

(49) Prior to 1936 it was the practice of conduit sellers to have their own warehouses in principal cities. Conduit was stored therein for delivery to customers located in the area. Conduit was shipped to these warehouses in car lots and was sold in smaller quantities to small jobbers who secured prices reflecting the lower rates and gave

BLEED THROUGH – POOR COPY

them similar advantages to those enjoyed by large quantity buyers. This was objected to by the wholesalers who bought in car load lots for their own warehouses and who would have a freight advantage over their small competitors, except for this warehouse service. It was urged that manufacturers' local warehouses had the effect of putting the manufacturer in competition with his, or his competitor's, wholesaler customers, and with his own consigned stocks (Tr. 1881-3, 1889-90, 4263-4, 4304, 4375). Warehouse stocks encouraged price cutting (Tr. 4446) and it was shown that large wholesalers with consigned stocks would not be at greater expense than small dealers buying from warehouses (Tr. 3374).

The Conduit Committee of N.E.W.A., on May 4, 1936, reported that conditions at that time were largely due to (A) manufacturer's uneconomical local warehouse stocks and (B) unfair methods and abuses of building protection contracts by all branches of the industry. The report mentions recommending the following on the previous year:

287 "The discontinuance of manufacturers' local warehouse stocks for the reason, among others, that sales and deliveries out of these stocks through warehouses or through agents result in unfair price discrimination against those wholesalers who do their own warehousing and otherwise perform their full distribution service for the manufacturers."

(Cx. 40-A). At its meeting in September, 1936, the joint committee reported:

"It is very gratifying to your Committee to be able to state that manufacturers have discontinued local warehouse stocks in all sections of the country, except the Pacific Coast. There seems to be some division of opinion among electrical wholesalers on the Coast as to the desirability of such a step on the part of manufacturers."

(Cx. 39-A). However, in 1938 there was some concern expressed over the discovery that Youngstown and Triangle were carrying local stock in Chicago (Cx. 603). Also it was reported that General Electric had never discontinued its New York warehouse (Cx. 604); (see also Cx. 606; Tr. 4374). In January 1940, in Chicago the number of warehouse stocks had increased to include Steelduct, Triangle, M. B. Austin, Clifton and Clayton Mark (Cx. 616). General consent to discontinue manufacturers' warehouses had resulted in practically all of them being closed

with the exception of Chicago, where the proximity of Youngstown's mill at South Chicago presented special difficulties (Cx. 603, 616); Tr. 1896-7). Complaints against the establishment of warehouses were made to the R.S.C.A. and investigated in 1938 (Cx. 34-Y) and the joint committee of N.E.W.A. and manufacturers' representatives continued their opposition to the warehouses (Cx. 40-A to D, 41-A). On May 20, 1940, this committee reported:

"The manufacturers continued to express entire satisfaction with the economies resulting from the discontinuance of their local warehousing expense, and reiterate their liking for wholesaler warehousing as now in operation, thereby eliminating the unnecessary waste of additional expense involved in local warehouse stocks." (Cx. 42; Tr. 1883, 1889, to 1893, 1896-7).

(50) Diversions of conduit from the use contemplated in a specific job contract, were shown to affect prices injuriously on occasion. Where the contractor is protected against a price rise and the advance is substantial, he can use his lower price for underbidding his competitors or for speculation by taking more conduit than he needs on the specified job and selling it below prevailing prices. This has the effect of disrupting the new price levels. Padding or duplicating contracts in these circumstances is in violation of the agreements and the manufacturer's guarantee and the practice is contrary to the representations made by the contractor when he requires shipments. Members of the industry consider the practice fraudulent and a trade evil (Tr. 693-96, 700, 734). On occasion, investigation has disclosed serious abuses by contractors of the contract privileges, such as the request for shipment of 250 cars when only 75 were used, and requests for 975 tons when 225 were found to be needed (Tr. 906-9). On numerous occasions checking disclosed contracts with two or more sellers (Tr. 2267 to 2272). (see also Tr. 696-700; 1984; Cx. 487-A to P).

These building contracts have been the subject of some kind of checking for many years (Tr. 2627-8, 2650-58), and soon after Messrs. Blake and Booth of the O.S.C. took charge of the R.S.C.A. work, contracts were filed with the Association for investigation and were reported on by Mr. Booth after he had caused the field work to be done by the Hanson Agency and had received their report (Tr. 686 to 693; Cx. 9-E, 10-D, 11-C, 12-B, 13-B, C). These investiga-

BLEED THROUGH – POOR COPY

tions resulted, according to one detailed report, in the cancellation of 56.38% of the tonnage claimed under the contracts investigated, but a large part of this percentage represents cancellation for "invalidity" as duplications or as voidable from causes other than a surplusage of material (Cx. 10-D, 14-D, 15-D, 17-B; Tr. 648, 660-4). Investigations were made when requested (Tr. 656-660), and results were reported to all who were interested in the inquiry (Tr. 668, 692). (see also 2270-72). The prevention of over supply to contractors was not the only reason for checking; for contracts were also examined to determine their "validity" and to find out the price at which the conduit was sold so that this information could be reported to competitors (Tr. 660-664).

(51) "Closed transaction" investigations were made and reports submitted by the R.S.C.A. to requesting members and others. These related to cases of suspected price cutting where one seller had quoted and failed to get the business and wanted to know who did and at what price (Tr. 660 to 663). Such investigations as shown above often involved contract checking. Results of price investigations by the Association were sent out to all members requesting them, and Mr. Booth warned manufacturers when prices were quoted on their material by jobbers that they would be "liable under the Robinson-Patman Act for failure of these people to maintain your published schedule." This occurred in the case of National Electric's report of June 30, 1937, of price cutting bids to the School District of Philadelphia (Cx. 489-A, B, C.). Inquiries were then sent out by R.S.C.A. to various manufacturers, including Cohoes, Youngstown, Walker, Steel & Tubes, Garland, General Electric, Fretz-Moon, Central Tube, Clayton Mark, Enameled Metals, Steelduct, and Triangle. Reports were received back and information, including the names of manufacturers who sold the bidding concerns, was added to the blanks (Cx. 490-B). Manufacturers receiving inquiries stated whether or not the underbidder handled their goods. Triangle (Hawks) wrote—"the lower bidder is not our baby," while Walker admitted connection and reported that it had cancelled its contract with the price cutter (Cx. 490-I-J-K). (Tr. 718, Cx. 489-A to H; 490-A to N). The Association had regular blank forms for these inquiries and replies (Cx. 488-A to D) but in the case reported above, the inquiry sheet was returned with notations by the recipients (Cx. 489-D, E, H; 490-B et seq). This investigation and

action taken thereafter was deemed effective in the
288 Philadelphia School District matter, as the offender's subsequent bid was "right on the line" (Cx. 490-C, F).

National Electric inquired about, and the Association investigated, a report that Hatfield Supply Company had failed to charge for store door delivery service (Cx. 492 to 495). Black Conduit being sold at Washington in 1938 by Beacon Electric Supply Company at 15% "below the market," was the subject of complaint and inquiry. The manufacturers were queried, their replies received, and the matter was further investigated and reported (Cx. 519-A to C). Another instance of price cutting followed by complaints and questionnaires, related to bids opened in 1938 on conduit for the Boulder Canyon Project, Bureau of Reclamation (Cx. 520-A to C; Tr. 668 et seq.). (For price investigations, filings, complaints, and procedure under the N.R.A. Code see Cx. 112 to 172).

(52) Respondent sellers through communication with each other and with the R.S.C.A. and the N.E.W.A. endeavored to maintain a standard to which those dealing with them must conform in order to receive wholesale prices (Cx. 430). Selling to contractors at jobbers' or wholesalers' prices was recognized as an undesirable practice which operated to the disadvantage of contractors who were not or did not pretend to be jobbers. The wholesalers also felt that all contractors' business should be placed with or through them unless they were given sufficient price reductions to enable them to put their contractor customers on an equal price basis with the jobber-contractors (Tr. 2267 et seq.).

In May, 1938, Mr. Blake cautioned the manufacturers against selling contractors at wholesalers' prices, stating that such would violate the Robinson-Patman Act (Cx. 33-D). The joint committee of N.E.W.A. also discussed the problem in May, 1939 (Cx. 40-D). But long prior to the Robinson-Patman Act (June 1936) respondent sellers were seeking information from each other and from their organization as to whether particular firms were jobbers, users, or contractors, (Cx. 440, 443, 444). Some of these inquiries refer to a jobbers' definition (Cx. 445) and the R.S.C.A. in 1934 sought lists of concerns in the New England territory which "did not qualify as jobbers under the R.S.C.A. definition," and had received list of com-

BLEED THROUGH – POOR COPY

panies "recognized as wholesalers" by two local associations (Cx. 430, 431).

The R.S.C.A. conducted investigations and sent out questionnaires to its members to ascertain the status as wholesaler or contractor of particular firms (Cx. 491-A to M; Tr. 665, 679). The term "electrical wholesaler" is defined in the by-laws of N.E.W.A. so as to include the following qualifications: (1) A minimum of $25,000 stock carried and $100,000 per year sales, (2) sufficient stock warehoused to supply trade, (3) delivery and pick-up service, (4) trained selling organization, (5) catalogs, (6) credit extension to buyers (Cx. 312, pp. 4, 5). This organization published lists of its membership from time to time and these may be secured on request by any conduit manufacturer (Tr. 3994-98; Cx. 312 to 317). The N.E.W.A. has special memberships held by some who cannot qualify under its definition (Tr. 3995). The following requirements for "distributor agents," contained in the Uniform Consignment Contracts, appear to meet the approval of both sellers and wholesalers:

"Whereas, the Distributor Agent acts as a direct sales agent and also conducts a warehouse suitable to the carrying of a stock of Rigid Steel Conduit, Elbows, Couplings and other related accessories (all hereinafter called Rigid Steel Conduit), in sufficient volume and range of sizes and types adequately to serve the territory in which it operates, regularly employs a force of salesmen and conducts a recognized business of selling Rigid Steel Conduit for resale, to contractors, retailers and commercial and institutional purchasers, and avers that it does not sell, as a contractor, or otherwise, in significant amounts direct to the general public, nor to individual ultimate consumers • • •"

(Cx. 662 et seq.).

(53) Diversion in transit of railway shipments of conduit was opposed by respondent sellers, and in 1938 Mr. Booth sent out a circular memorandum suggesting that manufacturers adopt a practice followed by one manufacturer of conduit who stamped bills of lading as follows:

"The goods covered hereby are the property of the Consignor until delivery to the Consignee at the destination herein specified and shall not be diverted or reconsigned without permission of the Consignor."

(Cx. 481). Diversions in transit and otherwise were re-

garded as "the bane of the industry" and was discussed at R.S.C.A. meetings by Mr. H. S. Walker and others (Tr. 853, 860). Rail diversions had the effect of enabling a purchaser to make freight savings and thus own conduit at some points at less than the regular delivered price for those points. This permitted the consignee to undersell the local dealer (Tr. 853 to 856, 931-2). Where goods are diverted in transit the manufacturer receives the agreed price (or the delivered price to the original destination), but might not receive as high a price as he would have quoted and received as the delivered price at the final destination (Tr. 931-2; see also Cx. 223).

(54) Evidence throughout the record revealing respondents' methods of ascertaining competitors' prices and terms, evidence of the use of similar contract forms, price cards, rate and delivery charge books, evidence of various associational meetings and activities of sellers and wholesalers, much of which is cited in preceding paragraphs hereof, is to the effect that sellers and wholesalers generally had full and complete knowledge of the pricing methods used by all (Tr. 924, 972, 1158). Each respondent knew the formula and possessed the uniform factors (Par. 39, Cx. 546) which rendered it easy to figure for a given point a delivered price which its competitors would consider the regular or "market" price at that point (Par. 38, supra) and which would be the same to the fraction of a penny as the price competitors would quote if they chose to "meet competition" and not undersell "the market" (see Cx. 590 to 600; Tr. 1309-15, 1456, 1505, Tr. 289 2780, 2788). And it was shown to be the desire of sellers and wholesalers to stabilize prices and, in most cases, to make price quotations no lower than those quoted by competitors (Tr. 1145-7, Tr. 4637-8, 4641). They regarded identical quotations as competitive (Tr. 871, 889, 894, 902, 1103-6, 1143, 1158, 1309-15, 1342, 1362, 1394, 1428, et seq), but on occasion concessions were made by quotations that were "off card," and discounts on the standard card prices were sometimes given (Tr. 891-3, 924, 1479). (See also Tr. 3595, 4359, 4379, 4439, 4611, 4636; Cx. 72, 74, 76, 80, 521-A, 523; Tr. 432, 1765-73, 1907; Cx. 722 with Tr. 2457 to 2463).

(55) In addition to the concerted action heretofore indicated in the matter of developing method and a uniform selling system, respondent sellers took conscious parallel

BLEED THROUGH – POOR COPY

and collective action to effect more perfect results. Respondents, through R. S. C. A. investigated price cutting in the Philadelphia School matter and caused a member to cancel a wholesalers' contract as heretofore reported in Par. 48. This was in 1937 (Cx. 489).

Home Lighting Company, in 1935 (Cx. 416), was low bidder for supplying conduit to the Government for the Panama Canal. Twenty-eight other bidders submitted the same price, $3,080, which was the price filed under the Code (Cx. 284) but Home Lighting Company was $5.00 under and secured the award. Cohoes, whose product was specified and who was the bidder's regular supply refused to ship on account of the protest of F. C. Hodkinson, of the Code Authority (Cx. 287, 289, 290). Home Lighting then wired and wrote Austin which accepted the order and promised prompt shipment, but the next day it declined to ship on the stated grounds that its (Austin's) brand was not specified (Cx. 292). But it appears from Cohoes letter that it did not ship because Home Lighting Company would not withdraw its bid as requested by Cohoes (Cx. 416). Permission to substitute other brands was secured (Cx. 332; Tr. 312 et seq) but the conduit was finally supplied through outside jobbers and government purchases in open market (Tr. 194 to 236, 253 to 355; Cx. 287 to 303, 332, 333, 416 to 420).

(56) On June 1, 1937, Baldwin-Hall Co., a consignment stock wholesaler, complained to Cohoes of general price cutting and demanded protection as against jobbers who were selling on cards 72 and 74 (lower than the prevailing 76) (Cx. 521-A). Cohoes predicted lower prices "if the boys did not get together"; and on June 8 it wrote the wholesalers demanding adherence to Card 76 and stating that any distributor violating this requirement would be "given due notice that their agreement is cancelled." It requested reports of violations (Cx. 524). On the same date Enameled Metals' vice president wrote confidentially (Cx. 531-A) to L. A. Woolley, Inc., that Youngstown had assured him "that the McCarthy Brothers & Ford-Land deal had been straightened up," Woolley, McCarthy Bros. & Ford being wholesalers and members of N. E. M. A. (Cx. 313, p. 12). The letter refers to the Steel interests as making tremendous efforts to hold their prices and says further:

"We were directly told that if we wish to have a supply

of pipe, we would have to maintain our resale. We have reason to believe that other manufacturers sent out the same instructions that we did, and we sincerely trust that an honest effort will be made to hold Card 76."
This letter further says:

"You will recall that the conduit committee of N. E. W. A. asked the manufacturers if they would notify their customers that they must observe the resale, in view of their agency contract, and further they asked the manufacturers if they would not cut off any agent who violated the agency agreement. These two (2) conditions coming up at the same time, we mean the attitude of the Steel Industry and the request of the jobber, makes it necessary for us to insist upon adequate resale."
(Cx. 531-A, B, but see Tr. 2543; see also Cx. 530 to which this is a reply.)

Direct agreements to maintain Card 76 on new business was made at a meeting of labeled conduit manufacturers attended by O'Brien, wholesaler. Mr. Robert Garland says "All" agreed to this (Cx. 558; Tr. 4739, et seq. but see Tr. 2288 et seq.)

(57) Vice president J. A. Hawks, of Triangle, on June 7, 1938, wired and wrote M. B. Austin Co., stressing the importance of strict adherence to Card 76 by "all of our conduit distributors." The letter referring to the wire, says in part:

"It is my understanding that there will be a decided improvement in the competitive situation on all makes of conduit— I have talked the matter over with several of our competitors and it is my understanding that they are taking similar action," (Cx. 448).

Austin, as suggested, took similar action by sending out a bulletin letter post haste (Cx. 451). Austin also reports to Triangle that the Chicago Electric Wholesalers Association had adopted a purchase price, on which situation Triangle commented:

"Whether or not the conduit industry will permit group deviation on their own initiative, such as is the case in this instance, is something which I will let you know more about next week after I have opportunity to discuss the matter with several of our competitors."
(Cx. 452, see also Cx. 449 to 453). Austin's letter to Triangle, Cx. 449, referring to the Chicago Wholesaler's action concludes as follows: "We certainly hope that the

BLEED THROUGH – POOR COPY

combined action of the manufacturers will straighten the situation out."

(58) Price cutting by J. E. Graybill & Co., a wholesaler, in 1937, was promptly inquired into by Mr. Booth of the R. S. C. A. and Garland was required to investigate and report (Cx. 537, 540, 542, 544). In the exhibit last cited Mr. Booth informs Mr. Garland that selling by his distributors might put him in "a discriminating position" under the Robinson-Patman Act and that the distributors should be made to understand that they as well as the manufacturers are liable for triple damages. Writing to Leo P. O'Brien and referring to the Industry meeting in Pittsburgh, October 8, 1937, Garland says:

"The manufacturers are all for stabilization, and I am inclined to think that there will be very little new business taken below Card 76—The manufacturers are doing their best to stick to Card 76 on all new business and they believe it can be done. A few of the manufacturers made the statement that they had no difficulty whatever in obtaining Card 76 in the metropolitan district. This is what we are aiming at—." (Cx. 541)

Mr. Booth and R. S. C. A. circularized the industry November 4, 1937, regarding selling below published price schedules by four wholesalers to the Pennsylvania State College. His inquiry went to their source of supply and contained his warning against violation of the Robinson-Patman Act (Cx. 543, 548, 549). On this case Garland writes W. A. Leiser & Co., November 22, 1937, as follows:

"Answering yours of the 20th regarding the State College job, do not think that we will let up on this until we know who cut the price. We have been writing about it at least twice a week since it happened, and have again taken the matter up today for a prompt reply." (Cx. 545) (See for other instances of reports on investigations of price cutting Cx. 535, 536, 546, 547, 550, 551, 552, 553, 554, 559, 560, 561).

(59) Respecting price fluctuations relative to volume of sales (as indicative of demand), and price rigidity during a period of time, it was shown that total sales in February, 1937, (within 5% of correct total for the entire industry) amounted to 11,516 tons of conduit. Card 74 was current to February 15th with 1" black conduit listed at $7.79 per hundred feet, car rate, Pittsburgh (Cx. 61-Z10), and Card 75 obtained for the remainder of the month and until

March 9, 1937. The latter carried a price of $7.87 (same specifications). Card 76 appeared on the last named date with a price of $9.85 (Cx. 62-Z214, 68-Z6). The total sales for March, 1937, was 23,055 tons. Following are the sale totals in tons for succeeding months: April 16,151, May 11,273, June 9,701, July 10,433, August 10,149, September 8,753, October 9,965, November 8,165, December 7,355, January (1938) 6,956, February 6,865, March 7,443, April 7,968, May 7,155, June 7,251 (Cx. 712, 713; Tr. 1948-50). During all these months Card 76 remained current. Card 77, dropping the price to $7.76 (for 1" conduit as specified in each total above) appeared July 5, 1938 (Cx. 56-Z1).

During this time efforts heretofore described were being made to hold the line on Card 76 (see Pars. 56, 57, supra). Demand for conduit was shown to vary with building activities (Tr. 2074).

The price of raw pipe set by the steel mills appeared to be a large part of the cost of conduit, although labor costs are a considerable factor (Tr. 2136-40; Rx. 56, 59). And it was shown that several price changes in conduit followed closely on price changes in the raw material, or merchant pipe. An advance of $10 per ton in pipe on July 5, 1937, was followed on March 9, 1937, by Card 76 with an advance in conduit of $1.98 per hundred feet. Card 77, with a reduction of $2.09 per hundred feet followed an $8.00 per ton reduction in raw pipe. Card 80, with an increase of 39¢ per hundred feet reflected a $6.00 per ton differential put on by the steel companies (Tr. 2149-50). Other cards were said to reflect changes in the price of pipe, zinc, and labor (Tr. 2151-3, Rx. 56, 59).

(60) Appearing throughout the record are sworn denials by respondent individuals and by officials of respondent companies that they or other responsible officials or employees of their companies ever had any understandings or agreements with competitors to use the basing point or other pricing method or use price cards, freight books, delivery charge sheets, contract blanks, or to follow, raise, or lower prices, or to quote or bid any particular price, or that they felt obligated to do so or to adopt any methods discussed or suggested at meetings with competitors (For representative statements, see Tr. 2211, 2299, 2309 (as modified by 2362-72), 2670, 2719, 2736, 2805, 2839, 3335, 3411, 3416, 3562, 3617, 3626-7, 3631, 3677, 3680-2, 3697,

BLEED THROUGH – POOR COPY

3860-1, 4100, 4310-13, 4451, 4456). Some of the denials as qualified were not entirely inconsistent with the complaint (Tr. 1646, 1896, 2839), others went to discussions at meetings, but it was admitted by some respondents that commercial and price matters were discussed between competitors at informal meetings (Tr. 1305-6, 1880, 2549-53, 3558). All of this evidence was considered in the making of this report.

(61) Respondent sellers ordinarily refrained from quoting customers f. o. b. mill prices not derived from a delivered price by subtracting freight factors therefrom, but there were some exceptions to this rule (Cx. 53-70; Tr. 861-75, 1100, 1158, 1309, 1317, 1343, 1348, 1505, 1584-7, 1667). Flat mill prices unrelated to delivered prices cause variations between the quotations of sellers and disrupt the basing point price structure in the same way as to diversions in transit, price cutting, or calculating from unannounced freight factors (Par. 38, 53, and citations). Where land grant rates were involved in shipments to the U. S. Government from any seller's mill the freight factor was troublesome, for land grant rates are not uniformly quoted or known in advance of shipments. In such cases, to preserve uniformity, the delivered price was quoted with the condition that any land grant savings that could be made on shipments from other conduit shipping points would be equalized (Tr. 1604-10, 1631-46; Cx. 704).

(62) It appears throughout the record and from numerous citations heretofore set out that each respondent conduit seller had full and complete knowledge that all other conduit sellers use the same system, methods, and pricing factors, as set out in Paragraphs 38, 39, herein,

and had the same policy respecting f. o. b. mill ship-
291 ments as shown in Paragraph 61. Each conduit seller

employed these methods and policies in the belief that all other sellers would act in this manner and with the purpose of producing identical delivered price quotations. It is clear also that identical prices are the necessary result of the use of the system and common factors employed by respondent conduit sellers (Par. 40, 54, and citations). The record and citations set out above also show that respondent wholesalers had the same knowledge, expectations, and purposes, and that they employed the same methods and policies in the production and observ-

ance, in a large number of transactions, of identical delivered prices. (See Par. 39 and citations.)

(63) Distinguished economists testified on the various aspects of the basing point system and methods as outlined in respondents' "Hypothetical Statement A" (Tr. 4902 et seq.) and complainants' "Hypothesis No. 1" (Tr. 5979), both of which statements are appended to this report marked Appendix A and Appendix B, respectively. Respondents' testimony was to the effect that such conditions as were assumed in "Statement A" could evolve through the natural operations of economic law, and that the statement describes the following requirements for the spontaneous, competitive growth of the system, to wit: (1) The product must be standardized; (2) there must be competition, (3) a relatively small number of producers distributing their product to a large number of informed sellers widely scattered geographically; (4) plant capacity in excess of local demand; a relatively heavy product so that freight would be a substantial proportion to the delivered value and (5) a considerable overhead cost not changed by variations in output (Tr. 4902-30). A pricing system conditioned as stated was held to be competitive and could arise without consultation or collusion (Tr. 4931). This opinion, however, is based on the prior assumption that "Statement A" includes the necessary competitive factor (Tr. 4927-8).

As may be seen, respondents' assumptions include methods and conditions heretofore set out in this report except activities, statements, or transactions bearing on agreement, conspiracy, and concerted action. It was admitted that the presence of conspiracy and agreement would negative the idea of methods actually evolved (Tr. 5262), but occasional acts of collusion would not, according to Professor Fairchild, alter his opinion as to the competitive character of the assumed conditions (Tr. 5073-77).

(64) The complainants' assumptions, "Hypothesis No. 1" (Tr. 5979, Appendix B), follows generally the factual charges in the complaint but avoids any assumption of competition and of the demand for conduit being inelastic. These complete assumptions cover conditions about which there is little serious controversy and which are supported by substantial evidence as cited and reported herein (Tr. 5979, 5984-90). Professor Gray gives as his economic opinion that the assumptions of "Hypothesis No. 1" are

not consistent with competition as he finds it outlined in economic literature but that such conditions are referred to by some economists as "monopolistic competition" (Tr. 5991). Other distinguished economists give interesting opinion evidence in support of the one or the other views expressed by Professors Fairchild and Gray, all of which evidence is respectfully commended to the Commission. When differences of definition are considered, there is more agreement in the testimony than appears superficially. See record as follows: Dr. E. G. Nourse, Director Institute of Economics, Brookings Institute (Tr. 1908, 1998), Professor Horace M. Gray, University of Illinois (Tr. 5938), Professor William N. Loucks, University of Pennsylvania (Tr. 6326), Professor Fred Rogers Fairchild, Yale (Tr. 4870), Professor Claire E. Griffin, University of Michigan (Tr. 5330), Professor J. Philip Wernette, Harvard (Tr. 5602), Professor Horner B. Vanderblue, Northwestern University (Tr. 5684).

(65) Respondents' pricing methods as set forth herein involve mutual dumping or cross shipping (Tr. 6357), which does not operate to increase total consumption or total output of a product (Tr. 6400) but increases total costs of sale and delivery, increase prices (Tr. 6426-44), and is inconsistent with, and indicative of the absence of, effective competition (Tr. 922-27), 1484-95; 6335-8; 6357; 6520; Contra Tr. 4994 to 5002). The basing point method of pricing, including as it does the use of common delivery cost factors and the general practice of quoting delivered prices, reduces or limits general competition and destroys price competition (Tr. 6353-4, 6400; Par. 64, 63 infra).

Respectfully submitted to the Commission for its ultimate findings and conclusions.

This the 23rd day of July, 1942.

/s/ John W. Norwood,
Trial Examiner.

Note: The trial examiner's report is not a report or finding of the Commission. Such report is advisory only and is not binding upon the commission.

Note: Laclede's Delivery Charge Book was received in evidence as Cx. 77-A (with numbered pages from 1 to 32). (See Tr. 1041, 1043.) Thereafter Laclede's Freight Rate Book was received and was erroneously marked Cx. 77-A to Z5. This exhibit should be marked Cx. 77-B to Z5. (See Tr. 1041, 1339.)

292 Appendix A.

Hypothetical Statement A.

(Assumptions used in Respondents hypothetical questions Tr. 4902, see Pars. 63, 64.)

(Assumptions used in Respondents hypothetical questions Tr. 4902, see Pars. 63, 64.)

1. Rigid steel conduit is made from standard steel pipe by first putting it through a cleaning and smoothing process and then through a coating process, dependent upon the nature of the coating applied to it. It is produced in two types, namely, black enameled conduit and galvanized conduit. Both types are produced in various sizes ranging from one-fourth inch to six inches inside diameter. Galvanized conduit is customarily sold at a somewhat higher price than black enameled conduit. Except for use under special local conditions which may require the use of one type or the other, the choice between one type and the other is governed largely by the preference of the user. Each type as produced by different manufacturers is a standardized commodity which must meet minimum specifications of, and is subject to inspection by, The Underwriters Laboratories, Inc., sponsored by the National Board of Fire Underwriters. In the further statement of facts to be assumed, the two types of rigid steel conduit will be together referred to as conduit.

2. Conduit is used in the construction and reconstruction of buildings to constitute raceways through which insulated electric wires may be drawn.

3. There are in the United States eleven manufacturers of conduit which are independent each of the others and the largest of which has a productive capacity of less than 20% of that of the entire industry. The conduit manufacturing plants of seven of them, including at least two of the principal conduit manufacturers and comprising in the aggregate over 75% of the productive capacity of the conduit industry, are located either in Pittsburgh, Pa., or within an area surrounding Pittsburgh, from which freight rates to destinations outside of that area are in general the same as freight rates from Pittsburgh to those destinations respectively. One other of such eleven

BLEED THROUGH – POOR COPY

conduit manufacturers has its principal conduit manufacturing plant at Struthers, Ohio, and a second such plant at Indiana Harbor, Ind., which is within the Chicago freight rate area. The conduit manufacturing plants of the three other conduit manufacturers are located, respectively, at Cohoes, N. Y., Conshohocken, Pa., and St. Louis, Mo.

4. Each of the above-mentioned conduit manufacturing plants is located near a center of production of standard steel pipe, which is the principal raw material used by most of the manufacturers. The conduit manufacturing plants located at Struthers, Ohio, and at Indiana Harbor, Ind., are operated in connection with fully integrated steel plants at which standard steel pipe is produced. The conduit manufacturing plant at Cohoes, N. Y., is operated in connection with a pipe mill which manufactures standard steel pipe from skelp which it purchases as its raw material therefor.

5. Conduit is sold by the manufacturers thereof almost entirely through dealers. The dealers are located in various centers in all the States of the United States. Most of the manufacturers follow the practice of maintaining consigned stocks in the possession of dealers. By far the greater part of the sales of conduit are made out of such consigned stocks. On large construction jobs, however, shipments often are made directly from the mill. Some dealers buy conduit outright from the manufacturers and carry their own stocks thereof and do not have consigned stocks. The delivery of conduit on a large construction job customarily is scheduled closely in order to have it on hand at just the time when installation is to be made, thereby avoiding the inconvenience of handling and storage which would result from premature delivery or the disruption of work which would occur if it were not available when needed.

6. Conduit is sold by or through the dealers, chiefly to electrical contractors.

7. The total demand for conduit in the United States varies with fluctuations in building activity and the demand therefor in any given area likewise varies with the fluctuations in building activity in that area. The variations in building activity in one area, and hence the demand for conduit in that area, do not generally correspond

either seasonally or cyclically with the variations therein in other areas.

8. Some of the larger manufacturers of conduit maintain branch offices in various parts of the United States and all of the manufacturers thereof employ salesmen or manufacturer's agents to promote the sale of their conduit through solicitation of orders for conduit from electrical contractors and dealers, architects, and owners of buildings. Each of the manufacturers of conduit has in connection with its conduit business elements of cost which remain substantially constant under varying rates of production and sale and which together constitute a substantial part of the total cost of manufacturing the conduit manufactured by it, the percentage of such total cost represented by such element of cost varying with the rate of production.

9. Because the cost of conduit is normally only a small part of the total cost of a building project, the demand for conduit is not materially influenced by the prices payable for it. The cost of transportation is a substantial part of the cost of conduit delivered at any point of use or resale which is at all remote from the place of the manufacture thereof. Differences in quality between conduit of the same type sold by different manufacturers and in the service furnished by such manufacturers to their customers, although stressed by salesmen and through advertising, are as a rule not such as to induce buyers to pay more for the conduit produced by one manufacturer than for that produced by another manufacturer.

10. Conduit was first manufactured in or near Pittsburgh, Pa., by two independent companies, both of which began production of conduit there in 1897. Within the next few years other manufacturers began the production of conduit also in the Pittsburgh district.

293 11. Conduit has usually been quoted and sold at destination prices, although from time to time some manufacturers have, upon request, quoted and made sales on an f. o. b. mill basis. It has been the experience of the manufacturers of conduit that their customers generally prefer delivered prices rather than prices f. o. b. mill. Moreover, it has been the custom for manufacturers of conduit to prepay the freight on their conduit shipments to their consigned stock agents in order that such agents

BLEED THROUGH – POOR COPY

may not have any property interest in such stocks until sold.

12. The manufacturers of conduit in the Pittsburgh area in quoting and selling conduit delivered at points to which shipment must be made from their plants commonly quote prices therefor equivalent to the price at Pittsburgh, plus the freight from Pittsburgh to the respective places of delivery of the conduit and sell conduit at delivered prices so determined. Conduit produced at the other points outside of the Pittsburgh area previously stated is likewise commonly quoted and sold at the prices current at Pittsburgh, plus railroad freight from Pittsburgh to the place of delivery. This method of quoting prices is commonly known and will hereinafter be referred to as the basing point method of quoting prices.

13. Up to about 1924 standard steel pipe was generally sold at prices based on Pittsburgh as the sole basing point. Beginning in 1924, standard steel pipe was sold at prices based on Gary, Ind., as a basing point, as well as at prices based on Pittsburgh. In the same year the manufacturer then producing conduit at Evanston, Ill., inaugurated the practice of also quoting and selling conduit at delivered prices determined by adding freight from Evanston to the respective places of delivery to the price at Evanston named by such manufacturer, which price was, in the case of each of the two types of conduit $4 per ton above the current published price of such conduit at Pittsburgh. The quoted prices were based on Pittsburgh or Evanston as the basing point, according as the one or the other would give the lower delivered price. At that time the price of standard steel pipe at Gary, from which Evanston is not far distant, was $4 per ton higher than the price of such pipe at Pittsbrugh. The differential of $4 per ton in the price of conduit at Evanston over the price of conduit at Pittsburgh was less than the freight charge per ton on conduit shipped from Pittsburgh to Chicago or to Evanston.

14. In the latter part of 1934, a manufacturer then producing conduit in Chicago began quoting and selling conduit at delivered prices determined by adding to the price at Chicago published by such manufacturer freight from Chicago to the places of delivery. Freight rates from Chicago to Evanston, except to certain points in the immediate vicinity of Chicago or Evanston, were the same.

Shortly after 1934, Evanston ceased to be a basing point for conduit.

15. The manufacturers of conduit that had their plants in the Pittsburgh area followed the practices inaugurated by the abovementioned manufacturers at Evanston and Chicago and also quoted delivered prices for conduit based on Evanston as the basing point beginning in 1924 and on Chicago as the basing point beginning in 1936.

16. Each of the manufacturers of conduit whose conduit manufacturing plants were, as previously stated, at locations other than Pittsburgh, Evanston, and Chicago, from the time of beginning the manufacture and sale of conduit, met the delivered prices that such manufacturer found current from time to time by also quoting delivered prices based on Pittsburgh, and later on Evanston and Chicago, as basing points. Each such manufacturer has since continued to quote prices for and sell conduit at delivered prices so determined. Thus, there came into use in the conduit industry two basing points.

17. In the year 1912 or 1913, the two largest manufacturers of conduit, both located in the Pittsburgh freight rate area, became exclusive "rigid conduit agents" for one of the large manufacturers of standard steel pipe under an arrangement (which lasted several years) whereby these two conduit manufacturers converted pipe furnished to them by their principal into conduit and sold such conduit for the account of their principal, the agents retaining a percentage of the proceeds as compensation for their services. For some years prior to 1913, the above-mentioned pipe manufacturer had been announcing quotations of pipe prices which were based on Pittsburgh as a basing point, and when the two conduit manufacturers became conduit agents for the pipe manufacturer, they began the announcement of conduit prices on a similar basis through the use of cards, the identifying numbers of the cards issued by the one of such conduit manufacturers being the same as the identifying numbers of the cards issued by the other of them. This practice was followed by the other smaller conduit manufacturers, and since that time, manufacturers of conduit generally have followed the practice of announcing prices by issuing price cards, the price cards of all manufacturers in effect at corresponding periods bearing the same identifying numbers, with exceptions occurring when one or more manufacturers have omitted to

BLEED THROUGH – POOR COPY

issue price cards bearing a number corresponding to the number of a new price card issued by another manufacturer or other manufacturers. In the event of such an omission, the manufacturer not issuing the new price card usually continues to sell on the basis of its old card less such discounts or concessions as it may feel necessary to offer to meet competition.

18. There has been no substantial price leadership condition among manufacturers in the conduit industry. Different manufacturers of conduit from time to time have announced changes in the price quotations of conduit which have not been invariably followed by all other conduit manufacturers. Any conduit manufacturer, no matter how small, can initiate an effective decrease in price. In cases where a conduit manufacturer has issued a new price card showing increased price quotations, such prices have rarely become effective, unless all competing conduit manufacturers have followed the action and issued new price cards showing the same increased price quotations.

19. Deviations from card prices in the sale of conduit have been common, except in periods of extremely low
294 prices or when the demand for conduit has approximated or exceeded the productive capacity of the conduit industry. Manufacturers commonly allow discounts below their published prices, and the knowledge of these price cuts by competitors, especially in the larger centers or on large orders, often leads to still further price concessions. Manufacturers have observed that, if a special price is quoted to one customer, other customers, upon learning of that fact, demand similar concessions.

20. Manufacturers maintaining consigned stocks in the possession of dealers usually enter into forms of contracts with such dealers which provide that sales of conduit out of such consigned stocks shall be made at prices no lower than the manufacturers' published prices.

21. Changes in announced card prices customarily follow changes in prices of pipe, the principal raw material for the manufacture of conduit, and increases in the price of conduit have also followed increases in the price of zinc, which is used in the manufacture of galvanized conduit, and increased labor costs. Reductions in published conduit prices have sometimes followed periods of selling below card prices in the principal conduit markets. During the last eight years there have been as many as fifteen changes

in the quotations of conduit prices published by various conduit manufacturers, the periods of time between the dates of such changes varying from less than a month to approximately a year and a half.

22. On specific building contracts dealers and contractors are protected against an increase in price for varying periods of time, and they are given the benefit of the new low price in the event of any decline in price. Upon an increase in price, purchasers of conduit other than under such contracts are also protected by being given an opportunity for a certain period of time to place orders at the old price.

23. In submitting bids to governmental agencies for public openings, where the inquiries specify delivered prices, the policy of most manufacturers of conduit is generally to bid their card prices. The reason most often given in the record for that policy is that bids so submitted will become generally known and that, if a conduit manufacturer submits a bid that is less than its card price, that fact will lead to requests for similar concessions on the part of the customers of such manufacturer and thereby result in a general reduction in price.

Appendix B.

Hypothesis Number 1.

(Assumptions used in Commission's Hypothetical questions—See pars, 63, 65; and Tr. 3979.)

I ask you to consider that the following is a statement of practices, conditions and circumstances prevalent in the rigid steel conduit manufacturing industry up to January 25, 1941.

Assume that rigid steel conduit is used as raceways in electrical installations.

Assume that the principal raw materials from which it is manufactured is steel pipe.

Assume that some operating and producing mills are located in or near Pittsburgh, Pa., and that other operating and producing mills, some of which have large producing capacities, are located at Conshohocken, Pa., (near Philadelphia,) Struthers, Ohio (in the vicinity of Youngs-

BLEED THROUGH – POOR COPY

town, Ohio), Butler, Pa., Cohoes, N. Y. (near Albany), St. Louis, Mo., and at Indiana Harbor, Ind. (between Gary and Chicago).

Assume that manufacturers of rigid steel conduit which produce and market in any given territory desire to make more sales involving more tonnage than they have secured and that the demand for rigid steel conduit in the United States at prevailing prices is less than the capacity of the plants to produce.

Assume that it is the general practice of rigid steel conduit manufacturers to publish and distribute to the prospective customers price quotation sheets which are commonly known in the industry as "price cards," and which contain quotations of what are designated therein as Pittsburgh, Pa., and Chicago, Ill., base prices to be used as factors in arriving at delivered price quotations.

Assume that the rigid steel conduit manufacturers specify in their price quotations that prospective purchasers in determining delivered price quotations f. o. b. cars at their respective destinations must do so by adding to the Chicago base price or Pittsburgh base price quotations, whichever of those two basing points is said by the manufacturers to be the nearer freightwise to the buyer's location, another price factor designated by the manufacturers as "delivery charges," and which is reputed by them to be a rail freight rate to the destination from the applicable basing point, and that the delivered price quotations which it is said must thus be determined and used no matter where the shipments of rigid steel conduit originate are arrived at through the use of a delivery charge factor adjusted and translated by the manufacturers from terms of cents per hundred pounds into terms of cents per hundred feet and that when they are so translated and adjusted they do not represent actual or exact transportation costs from either Pittsburgh or Chicago to the destinations involved.

295 Assume that according to the formula thus used the delivered price quotations which apply throughout the greater part of the continental United States and for export are those calculated from the use of the Pittsburgh, Pa., base price, the exceptions being certain locations and areas contiguous to Chicago covering portions of the States of Illinois, Missouri, Iowa, Wisconsin and Michigan and certain other separated and scattered areas or

locations in Texas, New Mexico, Colorado, Wyoming and Utah at which the delivered price quotations are calculated from the use of the Chicago base price.

Assume that delivered price quotations thus made by rigid steel conduit manufacturers are matched and made the same by all such sellers of rigid steel conduit at any of the destinations where they make price quotations on rigid steel conduit.

Assume that the "price cards" of the rigid steel conduit manufacturers have not carried quotations on the basis of f. o. b. mill at the point of production separately from and independently of the use of the basing point formula of determining delivered price quotations.

Assume that up to and including January 25, 1941, the date of the issuance of the complaint in this case, numerous sales were made by rigid steel conduit manufacturers at amounts which were calculated and determined through the use of the so-called basing point prices in accordance with the formula and procedure as specified, described and provided for in the aforesaid "price cards".

Assume further that when sales were thus made by the rigid steel conduit manufacturers and shipments as a result thereof made to customers located in the Chicago basing territory and the Pittsburgh basing territory each such manufacturer received from its respective customers, amounts of money in the form of mill nets which systematically varied in accordance with the basing point formula of price quoting with higher mill nets being received from its nearby customers than from its more distant customers.

Assume that the amounts in the form of mill nets received by each such manufacturer whose mills are located at Conshohocken, Pa., Cohoes, N. Y., St. Louis, Mo., Struthers, Ohio, and Butler, Pa., systematically varied between its respective customers, with higher mill nets being received from its nearby customers than from its more distant customers, irrespective of whether such shipments were made within or into either the Pittsburgh or the Chicago basing territories, and that the higher mill nets thus involved reflected in part a calculation and addition to the applicable base price certain phantom or fictitious freight factors not incurred as costs by anyone.

Assume also that substantial shipments are being made by rigid steel conduit manufacturers whose mills are lo-

BLEED THROUGH – POOR COPY

cated in and around the Pittsburgh basing point into the territory where delivered price quotations are controlled by the Chicago basing point.

Assume that so-called Chicago base price is substantially higher than the so-called Pittsburgh base price, but not by an amount which is equal to the rail freight from Pittsburgh to Chicago.

Assume also that substantial shipments are being made by rigid steel conduit manufacturers whose mills are located in and near Pittsburgh into the freight advantage territory of the rigid steel conduit manufacturers whose mills are located at Conshohocken, Pa., (near Philadelphia) Cohoes, N. Y. (near Albany), Struthers, Ohio (near Youngstown), Moundsville, W. Va. (near Wheeling), and Butler, Pa., and that the manufacturers with mills at those places are also making substantial shipments to locations in the freight advantage territory of Pittsburgh with some shipments being made by some manufacturers into Pittsburgh.

384 UNITED STATES OF AMERICA.

BEFORE THE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 6th day of June, A. D. 1944.

Commissioners:

Robert E. Freer, Chairman,
Garland S. Ferguson,
Charles H. March,
Ewin L. Davis,
William A. Ayres.

* * (Caption—4452) * *

386 FINDINGS AS TO THE FACTS AND CONCLUSION.

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on January 25, 1941, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair methods of

competition in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before an examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the answers thereto, testimony and other evidence, report of the trial examiner and exceptions thereto, briefs in support of and in opposition to the complaint, and oral argument by opposing counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

Findings as to the Facts.

Paragraph One: (a) Respondent Rigid Steel Conduit Association (hereinafter frequently referred to as RSCA) was an unincorporated voluntary association, the membership of which included the manufacturers of substantially all the rigid steel conduit produced in the United
387 States. It was organized in April 1934 as the immediate successor to the Rigid Steel Conduit Section of the National Electrical Manufacturers Association, the members of which voted to dissolve that section and on the same day organized RSCA. In turn, the Rigid Steel Conduit Section of the National Electrical Manufacturers Association was successor to the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies, which was organized about 1915 and which became the National Electrical Manufacturers Association about 1926. RSCA was organized for the stated general purposes of considering matters of common interest in the manufacture and sale of rigid steel conduit, improving methods of distribution, and collecting and distributing information and data of value to the industry. The first step toward the dissolution of RSCA was taken at a meeting on April 19, 1939, the minutes of which recite in part:

* * * on motion, seconded and carried, it was voted to cease all forms of Association activities, except such as

BLEED THROUGH – POOR COPY

are necessary to close up outstanding commitments and obligations, and place the Association in abeyance, subject to its possible revival in the future, should conditions at a later date indicate the possibility of its functioning successfully in keeping with its originally expressed purposes (Com. Ex. 35-E).

At a meeting on April 16, 1940, a resolution for the dissolution of RSCA was passed, to be effective as of May 31, 1940. From the time of its organization in 1934 until its formal dissolution it maintained its offices in New York City.

(b) Respondent Herbert S. Blake, an individual, is a lawyer with offices in New York, New York, and as president of respondent Organization Service Corporation is engaged in the management of the affairs of a number of trade associations. In October 1936, he undertook to aid in and direct the affairs of RSCA, and in March 1937 he became president of RSCA and continued in that office until his resignation in April 1939.

(c) Respondent Lawrence R. Quinn, an individual, vice president of respondent Enameled Metals Company, was active in the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies, in the Rigid Conduit Section of the National Electrical Manufacturers Association, and in RSCA, in which at various times he served as treasurer, member of the board of directors, and chairman of the board of directors.

388 (a) Respondent Paul Weiss, an individual, treasurer of respondent Organization Service Corporation, served as assistant treasurer of RSCA from December 1936 until April 1938, and also supervised and carried on statistical work for RSCA.

(e) Respondent Robert S. Booth, an individual in the employ of respondent Organization Service Corporation, served as secretary pro tem of RSCA from December 1936 to January 1938, when he became executive secretary of RSCA and continued in that capacity until April 1939. During his connection, and that of Organization Service Corporation, with RSCA he supervised and carried on many activities for and in behalf of that association.

(f) Respondent I. A. Bennett, an individual, vice president of respondent National Electric Products Company, was active in the Rigid Conduit Section of the National Electrical Manufacturers Association and took a leading part in the affairs of RSCA. At various times he served

as a member of the board of directors of RSCA and as chairman of such board.

(g) Respondent James M. Barton, the individual referred to in the complaint as J. M. Barton, president of respondent Fretz-Moon Tube Company, Inc., was active in and at various times served as a member of the board of directors of RSCA.

(h) Respondent Harry G. Morrow, the individual referred to in the complaint as H. G. Morrow, formerly vice president of respondent Central Tube Company and thereafter connected with respondent Spang Chalfant, Inc., was active in the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies, in the Rigid Conduit Section of the National Electrical Manufacturers Association, and in RSCA. At various times he was a member of the board of directors of RSCA.

(i) Respondent Harvey S. Walker, the individual referred to in the complaint as H. S. Walker, president of respondent Walker Brothers, was active in the Rigid Conduit Section of the National Electrical Manufacturers Association and in RSCA. At various times he served as an officer of RSCA and as a member of its board of directors.

(j) Respondent A. E. Newman, an individual, manager of Wiring Materials Sales of respondent General Electric Company, was active in the affairs of RSCA. He was elected to the board of directors of that association in January 1938, but after attending at least two board meetings declined to accept the position, and on July 13, 1938, the board of directors accepted his resignation.

389 (k) Respondent Central Tube Company (hereinafter frequently referred to as Central Tube) was a corporation organized under the laws of the State of Pennsylvania, with its principal place of business in Pittsburgh, Pennsylvania. It was engaged in the manufacture and sale of rigid steel conduit until about February 1940, when its assets were purchased by respondent Spang Chalfant, Inc., and thereafter its corporate existence was terminated in November 1940. Central Tube was a member of the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies, a member of the Rigid Conduit Section of the National Electrical Manufacturers Association, and a member of RSCA and participated in its affairs throughout the existence of that association.

(l) Respondent Clayton Mark & Company (hereinafter frequently referred to as Clayton Mark) is a corporation

organized and existing under the laws of the State of Delaware, with its principal place of business in Evanston, Illinois. It succeeded the Mark Manufacturing Company, which was purchased by respondent Youngstown Sheet and Tube Company in 1923. Clayton Mark discontinued the manufacture of rigid steel conduit about October 1938 and has subsequently sold conduit bearing its own brands which it has secured principally from Youngstown Sheet and Tube Company, and, to a limited extent, from respondents Enameled Metals Company and Fretz-Moon Tube Company, Inc. The Mark Manufacturing Company was a member of the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies. Clayton Mark was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association and a member of RSCA and participated in its affairs from the organization of that association until its dissolution.

(m) Respondent Cohoes Rolling Mill Company (hereinafter frequently referred as to Cohoes) is a corporation organized and existing under the laws of the State of New York, with its principal place of business at Cohoes, New York. It is a manufacturer of rigid steel conduit, with a plant capacity of about 800 tons of such conduit per month, and also manufactures other iron and steel products. Its conduit business constitutes but a small part of its total business. About January 1934, Mohawk Tube Company, Inc., successor to Mohawk Conduit Company, was merged with Cohoes. Mohawk Conduit Company was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association, to which membership the Mohawk Tube Company succeeded. The latter became a member of RSCA, in which membership it was succeeded by Cohoes.

Cohoes resigned from RSCA effective July 31, 1938,
390 but its representatives thereafter continued to attend meetings of that association and to take part in association activities.

(n) Respondent Enameled Metals Company (hereinafter frequently referred to as Enameled Metals) is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business at Etna, Pennsylvania. It manufactures rigid steel conduit from pipe purchased from respondent Spang Chalfant, Inc., and has a plant capacity of about 3,000 tons of such conduit per month. It was a member of the Interior Conduit

Section of the Associated Manufacturers of Electrical Supplies, thereafter a member of the Rigid Conduit Section of the National Electrical Manufacturers Association, and thereafter a member of RSCA and participated in its affairs until the dissolution of that association.

(o) Respondent Fretz-Moon Tube Company, Inc., (hereinafter frequently referred to as Fretz-Moon) is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business at East Butler, Pennsylvania. It manufactures rigid steel conduit and has a plant capacity of about 1,000 tons of such conduit per month. Its conduit is fabricated in part from pipe produced by itself, in part from pipe purchased from respondent Spang Chalfant, Inc. Its sales of conduit were made exclusively through respondent Steel and Tubes, Inc., a wholly owned subsidiary of respondent Republic Steel Corporation, from January 1934 until about September 1939. At that time Republic Steel Corporation, which owned 50 percent of the voting stock of Fretz-Moon, took over the assets of Steel and Tubes, Inc., including the contract between Fretz-Moon and Steel and Tubes, Inc., and thereafter conduit sales were made by Republic. Fretz-Moon was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association and became a member of RCSA. It resigned from RSCA on October 5, 1939, but continued the payment of dues to RSCA and its representatives continued to attend meetings and participate in the affairs of RSCA until the dissolution of that association.

(p) Respondent Garland Manufacturing Company (hereinafter frequently referred to as Garland) is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Pittsburgh, Pennsylvania. It is successor by change of name to Safety-Armorite Company, which in turn was successor by change of name to Safety Conduit Company,
391 under which name this respondent, one of the earliest producers of rigid steel conduit, entered the conduit business above 1897. Garland has a plant capacity of about 1,400 tons of conduit per month. It was reorganized under the bankruptcy laws and since June 1936 has been under the control of trustees and receivers. Robert Garland, formerly president of the company, has been manager for such trustees and receivers. Safety-Armorite Company was a member of the Interior Conduit Section of the Asso-

BLEED THROUGH – POOR COPY

ciated Manufacturers of Electrical Supplies, and Garland was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association and of RSCA and participated in the affairs of that association until its dissolution.

(q) Respondent General Electric Company (hereinafter frequently referred to as General Electric) is a corporation organized and existing under the laws of the State of New York, with its principal place of business in Schenectady, New York. Although one of the largest manufacturers of rigid steel conduit, having a plant capacity of about 5,000 tons of conduit per month, that commodity constitutes a very small portion of the total business of General Electric. It was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association and of RSCA. In July 1938, it submitted its resignation to RSCA but continued to participate in the activities of RSCA until approximately the time that association was dissolved.

(r) Respondent Laclede Steel Company (hereinafter frequently referred to as Laclede Steel) is a corporation organized and existing under the laws of the State of Missouri, with its principal place of business in St. Louis, Missouri. For a number of years preceding 1936 Laclede Steel, which manufactures wire and other steel products, had a wholly owned subsidiary, the Laclede Tube Company (hereinafter frequently referred to as Laclede Tube), a corporation organized under the laws of the State of Delaware, which had a plant capacity of about 200 tons of rigid steel conduit per month. In December 1936, Laclede Steel took over the assets of Laclede Tube and the latter corporation was dissolved. Thereafter, Laclede Steel manufactured, sold, and distributed rigid steel conduit, and in general carried on directly the business previously carried on through its subsidiary, Laclede Tube. Immediately after the dissolution of Laclede Tube, Laclede Steel caused the organization of Laclede Tube Company, a Missouri corporation, for the purpose of preserving that name, but this corporation has not actively engaged in any business since its creation. Laclede Tube was a member of RSCA
392 from January 1935 to June 1936, and although no representatives of either Laclede Steel or Laclede Tube amended meetings of the association, they both participated in carrying on the association activities and Laclede Steel continued to cooperate with RSCA and its members until that association was dissolved.

(s) Respondent National Electric Products Corporation (hereinafter frequently referred to as National Electric) is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at Ambridge, Pennsylvania. Successor by change of name to National Metal Molding Company, it is one of the largest producers of rigid steel conduit, having a plant capacity of about 5,500 tons per month, and is also engaged on a substantial scale in the production and sale of other products. American Circular Loom Company, a Delaware corporation, was a wholly owned subsidiary of National Electric from about 1914 until its dissolution in January 1937. For a substantial portion of this period it manufactured, sold, and distributed rigid steel conduit, and thereafter sold and distributed under its own brand names conduit manufactured for it by National Electric. Certain of its brands have been continued by National Electric to the present time. National Metal Molding Company and American Circular Loom Company were members of the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies. National Electric and American Circular Loom Company were members of the Rigid Conduit Section of the National Electrical Manufacturers Association and were members of RSCA and participated in its affairs until the dissolution of RSCA in the case of National Electric, and until its own dissolution in the case of American Circular Loom Company.

(t) Respondent Steelduct Company (hereinafter frequently referred to as Steelduct) is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Youngstown, Ohio. It is engaged in the sale and distribution of rigid steel conduit produced and shipped for it by Enameled Metals. Steelduct was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association and thereafter a member of RSCA and participated in its affairs until the dissolution of that association.

(u) Respondent Triangle Conduit & Cable Company, Inc., (hereinafter frequently referred to as Triangle) is a corporation organized and existing under the laws of
the State of Delaware, with its principal place of busi-
393 ness at Elmhurst, New York. In June 1940, through
a merger, it succeeded to the assets and business of Triangle Conduit & Cable Company, Inc., a New York corporation. For several years prior to 1929, Triangle se-

FILED THROUGH – POOR COPY

cured its supplies of conduit from Fretz-Moon, but since that date has manufactured its own conduit. It is one of the largest producers of rigid steel conduit, having a plant capacity of about 6,000 tons of such conduit per month, and is also engaged in the manufacture and sale of other products. It was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association and thereafter a member of and active in the affairs of RSCA until the dissolution of that association.

(v) Respondent Walker Brothers is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business at Conshohocken, Pennsylvania. It is a manufacturer of electrical construction materials, including rigid steel conduit, and has a plant capacity of approximately 2,000 tons of conduit per month. It was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association, and thereafter a member of RSCA and participated in its affairs until the dissolution of that association.

(w) Respondent Youngstown Sheet and Tube Company (hereinafter frequently referred to as Youngstown) is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Youngstown, Ohio. As a small part of its business, it is engaged in the manufacture of rigid steel conduit and its two plants where this commodity is produced have a productive capacity of about 4,400 tons per month. For a number of years the rigid steel conduit business of Youngstown was carried on through a subsidiary known as the Western Conduit Manufacturing Company, which was a member of the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies. Youngstown was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association and a member of RSCA and participated in its affairs from December 1935 to May 1938. Prior to its becoming a member of RSCA a representative of Youngstown attended meetings of that association as a guest, and subsequent to its resignation from that association Youngstown representatives frequently attended association meetings and served as members of association committees. Youngstown thus participated in the activities of RSCA at times when it was not a member of that association.

394 (x) Respondent Spang Chalfant, Inc., is a corporation organized and existing under the laws of the State

of Pennsylvania, with its principal place of business in Pittsburgh, Pennsylvania. It began the manufacture of conduit in February 1940, when it purchased certain assets of Central Tube and immediately began the operation of the conduit plant thus purchased. It has a productive capacity of about 2,500 tons of conduit per month, but this represents but a small part of its total business, as it is engaged in the sale and distribution of many other commodities. Spang Chalfant, Inc., was not a member of RSCA. In fact, the association dissolved soon after Spang Chalfant, Inc., acquired the assets of Central Tube in February 1940 and the only association meeting its representatives attended was the meeting of April 16, 1940, at which dissolution was voted.

(y) Respondent Steel and Tubes, Inc., was a corporation organized under the laws of the State of Ohio. It was a wholly owned subsidiary of respondent Republic Steel Corporation until October 1939, when it was dissolved, its assets taken over by Republic Steel Corporation, and its business continued as the Steel and Tubes Division of Republic Steel Corporation. As set out in subparagraph (o) above, Steel and Tubes, Inc., until its dissolution, was the rigid conduit sales agent of respondent Fretz-Moon, and thereafter the Steel and Tubes Division of Republic Steel Corporation was the exclusive sales agent for Fretz-Moon, one half of the voting stock of which is owned by Republic. Steel and Tubes, Inc., was not a member of RSCA but, nevertheless, its representatives frequently attended meetings of that association and Steel and Tubes, Inc., cooperated with and assisted in the activities of that association and its members.

(z) Respondent Republic Steel Corporation (hereinafter frequently referred to as Republic) is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in Cleveland, Ohio. Republic is concerned in the manufacture of rigid steel conduit through its ownership of 50 percent of the voting stock of Fretz-Moon. From 1934 until the dissolution of its wholly owned subsidiary, Steel and Tubes, Inc., in October 1939, it was indirectly engaged in the sale and distribution of conduit, and thereafter, through its Steel and Tubes Division, it was directly engaged in such activities. Through the membership of Fretz-Moon in RSCA and through the activities of Steel and Tubes, Inc., and those

FILED THROUGH = POOR COPY

of its own Steel and Tubes Division, Republic has cooperated with and assisted in the activities of RSCA and its members.

395 (1-a) Respondent M. B. Austin Company (hereinafter frequently referred to as Austin) is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois. It sells and distributes rigid steel conduit which in recent years has been manufactured for it by respondent Triangle but marked with Austin brands. In January 1935 it became a sales agent for Triangle under a purported consignment arrangement by which sales were made at the prices and on the terms specified by Triangle. It presently operates under a contract negotiated with Triangle in November 1939 by which it purchases conduit bearing its brands from Triangle. This contract contains provisions respecting passing on to purchasers any part of the discounts, commissions, or allowances received from Triangle under the contract. The provisions of this contract amount in substance to control of Austin's resale prices by Triangle. Though not a member of RSCA, through the relationship to Triangle and directly, Austin has cooperated and assisted in the activities of that association and its members.

(1-b) Respondents George L. Hatheway, Regina G. Hatheway, Katherine R. Hatheway, and Jane Hatheway are copartners trading as Clifton Conduit Company (hereinafter frequently referred to as Clifton), with their principal place of business in Jersey City, New Jersey. Clifton sells and distributes rigid steel conduit purchased from General Electric and marked with Clifton brands. Clifton's price announcements conform to those of General Electric. This concern was a member of the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies and applied for membership in the Rigid Conduit Section of the National Electrical Manufacturers Association, but apparently was not accepted because of difficulty over its status as a manufacturer. It was not a member of RSCA but followed many of the practices established or maintained by that association and its members.

(1-c) Respondent Charles Donley, an individual with offices in Pittsburgh, Pennsylvania, is engaged in serving various individuals, firms, and associations as traffic manager or adviser. Mr. Donley furnished railroad freight rate services to various individual conduit manufacturers; for

a period of time he prepared and furnished compilations of rates to RSCA for the use of its members in computing delivered prices; and thereafter, with the collaboration and aid of RSCA, furnished such compilations directly to the individual conduit manufacturers. At various times he advised and consulted with RSCA and the transportation
396 committee of that association as to the form of data to be furnished and the scope and manner of its distribution.

(1-d) Respondent Frank G. Hodkinson, an individual of East Orange, New Jersey, was connected with the rigid steel conduit industry in various capacities from 1897 to 1936. He has been connected with the Safety Conduit Company, Safety-Armorite Conduit Company, Garland, and American Circular Loom Company. His connection as vice president and general manager of the last-named concern was terminated in 1936 when that company was dissolved by its parent, National Electric, and he has not since had any substantial connection with the industry. During his service with the various concerns named, he was active in trade association matters. He assisted in the formation of the Associated Manufacturers of Electrical Supplies, and after the merger of that association with National Electrical Manufacturers Association was at various times a member of its board of governors. During the NRA Code period he was appointed by the board of governors of the National Electrical Manufacturers Association as the supervisory agency of the Roughing-in Classification of the Electrical Manufacturing Industry for the administration of the NRA Code as it applied to rigid steel conduit and other products included in the roughing-in classification. He also served as representative of the American Circular Loom Company at various meetings of RSCA from April 1934 to July 1936.

(1-e) Respondent Organization Service Corporation (hereinafter frequently referred to as OSC) is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 74 Trinity Place, New York, New York. Respondent Herbert S. Blake, an individual, is the president and active head of OSC; respondents Herbert S. Blake, Jr., an individual, N. Myles Brown, an individual, and Thomas B. Jordan, an individual, are vice presidents of OSC; respondent Paul Weiss, an individual, is treasurer of OSC; and respondent

FILED THROUGH = POOR COPY

C. C. Gregory, an individual, is secretary of OSC. Among the activities carried on by OSC and its officers is that of managing and directing the activities of a number of trade associations and furnishing various services and facilities to such associations. By contract executed October 29, 1936, OSC undertook to manage the affairs of RSCA subject to the association's board of directors, and also undertook to supply RSCA with offices and facilities for the conduct of its affairs. This contract remained in effect until December 31, 1938, and thereafter was reduced in scope and continued until April 1, 1939, when relations between OSC and RSCA ceased. As heretofore found, certain officers and employees of OSC also served as officers of RSCA.

397 (1-f) Respondent National Electrical Wholesalers Association (hereinafter frequently referred to as NEWA) is an unincorporated trade association of wholesalers and jobbers of electrical supplies, with its offices in New York City. It has a membership of approximately 200 such wholesalers and jobbers who are engaged in the sale and distribution of electrical supplies, including rigid steel conduit, through some 500 establishments scattered throughout most of the States of the United States. In the conduct of its affairs NEWA has various committees, designated as commodity committees, the members of which devote their attention, for the benefit of the entire membership, to particular classifications of electrical material. One such commodity committee is the rigid steel conduit committee. Respondents J. G. Johannesen, D. L. Fife, and Alfred Byers have served as chairman, vice chairman, and secretary, respectively, of the conduit committee, and respondents W. S. Blue, W. J. Drury, A. H. Kahn, C. H. McCullough, H. E. Rasmussen, H. O. Smith, L. E. Latham, F. R. Eiseman, W. R. Kiefer, H. B. Tompkins, A. L. Hallstrom, A. S. Reichman, and D. M. Smith have at various times served as members of such committee. Through the activities of this committee NEWA and its members have cooperated with and assisted RSCA and its members as hereafter set forth.

(1-g) Respondent General Electric Supply Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal offices in Bridgeport, Connecticut. It is a wholly owned subsidiary of General Electric. Respondent E. B. Latham & Company is a corporation organized and existing under the laws of the State of

New York, with its principal place of business in New York City. Respondent Fife Electric Supply Company has its principal place of business at 541 East Larned Street, Detroit, Michigan. Respondent Columbian Electrical Company has its principal place of business at 206 Grand Avenue, Kansas City, Missouri. Respondent Graybar Electric Company, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York City. Respondent W. T. McCullough Electric Company has its principal place of business at 317 First Avenue, Pittsburgh, Pennsylvania. Respondent Peerless Electric Supply Company has its principal place of business at 122 South Meridian Street, Indianapolis, Indiana. Respondent The Hardware and Supply Company has its principal place of business at 475 South High Street, Akron, Ohio. Respondent Revere Electric Supply Company (the concern referred to in the complaint as Revere Electric Company) is a corporation organized and existing
398 under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois. Respondent Kiefer Electric Supply Company is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Peoria, Illinois. Respondent Westinghouse Electric Supply Company is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York City. Respondent The F. D. Lawrence Electric Company has its principal place of business at 217 West Fourth Street, Cincinnati, Ohio. Respondent The C. S. Mersick and Company has its principal place of business at 278 State Street, New Haven, Connecticut. The respondents named in this subparagraph are wholesalers of electrical supplies, including rigid steel conduit. Each is a member of NEWA and representatives of each have at various times served on the conduit committee of that association.

Paragraph Two: (a) Each of the respondents named in subparagraphs (k) to (1-b), inclusive, of Paragraph One, except as otherwise stated therein, is engaged in the sale and distribution of rigid steel conduit to and through wholesalers, and pursuant to sales made, transports such conduit, or causes it to be transported, among and between various States of the United States and, in some instances, its territories, possessions, and foreign countries, and maintains, and has maintained, a course of trade in rigid

steel conduit in commerce, as "commerce" is defined in the Federal Trade Commission Act. These respondents are hereinafter frequently referred to, both individually and collectively, as "conduit sellers."

(b) Each of the respondents named in subparagraph (1-g) of Paragraph One is engaged in the sale and distribution of rigid steel conduit at wholesale, and in the course and conduct of their respective businesses, pursuant to sales made, transports rigid steel conduit, or causes it to be transported, between and among various States of the United States, and maintains, and has maintained, a course of trade in such conduit in commerce, as "commerce" is defined in the Federal Trade Commission Act. These respondents are hereinafter frequently referred to, both individually and collectively, as "conduit wholesalers."

(c) The respondents other than those referred to in (a) and (b) above are not individually engaged in the sale and distribution of rigid steel conduit in commerce but have directed, cooperated with, or assisted conduit sellers or conduit wholesalers in planning and executing the various
399 policies, practices, and methods, as hereinafter set forth. Each of the various conduit sellers and conduit wholesalers is in competition with other conduit sellers and conduit wholesalers to the extent that such competition has not been lessened or restrained by the acts and practices hereinafter described.

Paragraph Three: Rigid steel conduit (frequently referred to herein merely as conduit) is steel pipe which has been cleaned and galvanized or enameled in order to give it a smooth surface, particularly on the interior of the pipe. Usually made in 10-foot lengths and in sizes having interior diameters ranging from ¼-inch to 6 inches, it is installed in buildings and other construction projects where electrical wiring is necessary in order to furnish a continuous channel or container for such wiring. It is ordinarily put in place during the progress of the construction work and wiring is later installed by drawing it through the conduit. Thereafter, such wiring may at any time be withdrawn or supplemented as circumstances may require.

Paragraph Four: (a) For a long period of years respondent conduit sellers have used a delivered-price, basing-point system of quoting prices for and selling conduit. The manufacture of conduit had its origin a few years before the beginning of the present century. Several of the

pioneer producers of conduit were merely agents of steel companies for the purpose of converting pipe into conduit and distributing it. Safety-Armorite Company and National Metal Molding Company, predecessors of Garland and National Electric, respectively, were converting and selling agents for the National Tube Company, a subsidiary of the United States Steel Corporation. The first price card of the series presently in use to announce prices offered by respondent conduit sellers was issued by these converting agents about August 1, 1913, and was designated as card No. 1. Similar price cards were issued by other conduit sellers then in business. These cards quoted conduit prices in terms of cents per foot and stated the Pittsburgh basing discounts from such prices, with provision for reducing the rate of discount and thus increasing the price according to the railroad freight rate from Pittsburgh to the purchaser's destination. Using card No. 1 of the American Circular Loom Company of Boston, Massachusetts, as an example (Resp. Ex. 257-A), ½-inch conduit was quoted at 8½ cents per foot; the Pittsburgh basing discount on jobbers' carloads of galvanized conduit was 60 percent, so that the price delivered in Pittsburgh was $3.30 per hundred feet. At any destination other than Pittsburgh the discount was reduced at the rate of one-tenth of a point per one cent of railroad tariff rate per hundred pounds.
400 Thus, at a destination having a freight rate of 34 cents from Pittsburgh, the discount would be reduced 3.4 points to 56.6 percent, and the delivered price at such destination would therefore be $3.69 per hundred feet. This formula does not produce a price difference between Pittsburgh and other points exactly equal to the freight rate.

(b) In 1924, at about the time the steel companies added Chicago, Illinois, as a basing point in the sale of pipe, Youngstown, which had a conduit plant at Evanston, Illinois, announced an Evanston base price for conduit $4 per ton higher than the Pittsburgh base, and all other conduit sellers announced identical Evanston base prices. Clayton Mark, which established a conduit plant in Chicago in 1924 and began the distribution of conduit therefrom early in 1925, used a Chicago base price instead of an Evanston base. This did not amount to the general establishment of a third basing point, however, because the freight rates from Evanston and Chicago are the same to all points except locations within the Chicago switching district. The

FILED THROUGH = POOR COPY

discounts from the Evanston and Chicago base prices quoted by all conduit sellers were two points lower than those applicable to the Pittsburgh base and the same provision for determining delivered prices at other points according to the freight rates were applied as had previously existed with respect to the Pittsburgh base. The formula used also provided that at any given location the delivered price quotation of a conduit seller should be based upon Pittsburgh or Evanston, depending upon which base price and accompanying discount produced the lower figure at the purchaser's destination.

(c) Respondent conduit sellers followed the above-described list-and-discount method of determining delivered prices pursuant to their basing-point system until June 1930, when certain alterations cooperatively determined upon were made in the method of calculating such prices. The minutes of a meeting of the Rigid Steel Conduit Section of the National Electrical Manufacturers Association on June 4, 1930, attended by representatives of American Circular Loom Company, Central Tube, Enameled Metals, Fretz-Moon, Garland, General Electric, Mohawk Conduit Company, National Electric, Triangle, Walker Brothers, and Youngstown show the following action:

> The matter of simplified billing of Rigid Conduit along the lines of the plan submitted to Mr. Neagle by Mr. Sicard was discussed and it was the consensus of opinion of the 401 meeting that it is to the best interests of the public and the electrical trade that some such simplified method of net billing be followed (Com. Ex. 692-Z84).

National Electric issued a booklet dated June 10, 1930 (Com. Ex. 80-R), entitled "Freight Adders and Terms" containing various tables by the use of which a sum to be added to the base price as a delivery charge per thousand feet of conduit could be determined for a large number of destinations. These sums called "delivery charges" did not represent the exact amount of the freight rate from the controlling basing point to the destination specified, in part because of the manner in which fractions were treated in the calculations and in part because 5 percent was added to and included in such sum. Purchasers who took the discount for payment within the cash discount period were permitted to take such discount upon the delivered price, which included the so-called delivery charge. National Electric also issued price card No. 61 (Resp. Ex. 139-B), dated June 16, 1930, which was prepared for use in connec-

tion with the freight adders described above. Other conduit sellers made a similar change from the list-and-discount method of quoting prices. Price card No. 61 of Laclede Tube (Resp. Ex. 306-A to D), effective June 16, 1930, is in all substantial features and in almost all non-essential features a duplicate of the National Electric card. Beginning with card No. 1, all price cards issued by each of the respondent conduit sellers have borne numbers identical with those of the corresponding cards of the other conduit sellers, and the cards of all conduit sellers of any given number have been identical in all material particulars. In some instances individual conduit sellers have not issued a card of a given number and instead have announced a percentage discount from a previous card. Where the issuance of a card was thus omitted, however, the next card issued bore a number coinciding with that borne by corresponding cards of the other conduit sellers.

(d) The modification in pricing method described in the preceding subparagraph was followed by a further change made in the same year. Youngstown prepared a delivery charge booklet dated November 15, 1930 (Com. Ex. 89), which was more comprehensive and somewhat easier to use than the one devised by National Electric. This booklet, instead of using arbitrary key numbers, set out the delivery charges per thousand feet of each size of conduit according to any railroad tariff rate from one-half cent to $2.24\frac{1}{2}$ per hundred pounds, in steps of one-half cent each. These delivery charges also included an additional 5 percent, as had been the case with those devised by National Electric. Upon the request of other conduit sellers, Youngstown had copies of its publication printed without covers and sold 402 numbers of them to respondents Cohoes, Triangle, Walker Brothers, Enameled Metals, Steelduct, Steel and Tubes, Inc., Fretz-Moon, Garland, and Clifton. Upon the basis of circumstances shown in the record and a comparison of the pamphlets, it is concluded that Clayton Mark also secured copies of the Youngstown pamphlet. Respondent conduit sellers distributed these pamphlets to their salesmen, sales agents, wholesalers, and other customers, for use by such parties in calculating delivered prices for conduit. At about this time Clayton Mark abandoned the use of a Chicago base and adopted the Evanston base, so that all respondent conduit sellers were then using only Pittsburgh and Evanston as basing points.

(e) The use of the Pittsburgh and Evanston bases ex-

clusively continued until late in 1934, when Clayton Mark again instituted a Chicago base and ceased using Evanston. As heretofore stated, the rates from Chicago and Evanston are the same to all points except a few locations adjacent to these bases. Effective January 2, 1935, Youngstown instituted Chicago as a base and continued the Evanston base (Resp. Ex. 182). The situation thus created had prompt collective consideration. The minutes of a meeting of RSCA on January 17, 1935, recite in part:

(c) The Board of Directors recommends to the Association that the Evanston basing point be eliminated, leaving the two basing points—Pittsburgh, Pa. and Chicago, Ill.

After considerable discussion this recommendation was laid upon the table pending the report of the Special Committee on zoning (Com. Ex. 3-B).

At the time of this meeting respondent conduit sellers' price cards No. 70, issued in July 1934, were in effect. The next price cards (No. 71) were issued by respondent conduit sellers in January 1936 and were limited to the Pittsburgh and Chicago bases, the Evanston base being eliminated. With the exception of a minor change by which freight adders were shown in terms of hundred feet of conduit instead of thousand feet, respondent conduit sellers have continued their basing-point system without further change. The last proposed change as shown by the record was one considered at a meeting of RSCA on November 16, 1939. The minutes of this meeting do not show that any consideration was given to basing points, but H. H. Benfield, who was present at the meeting as a representative of Fretz-Moon, addressed a memorandum marked "Confidential" to certain of his associates under date of November 20, 1939,

403 in which he described various occurrences at the meeting. He said in part: Please note this memorandum and destroy.

There was a meeting of the various manufacturers of conduit in New York on November 16th at which all major manufacturers were represented except Triangle.

• • • • •

The fact that neither Youngstown nor Clayton-Marks manufacture conduit in Chicago any more, the dropping of the Chicago base was briefly discussed but it was decided not to do anything about it for the time being because of the possibility of investigation (Com. Ex. 622-A).

Paragraph Five: (a) In the establishment and main-

tenance through collective action of the basing-point, delivered-price system in its present form, respondent conduit sellers had the purpose of limiting and restraining the normal forces of competition. They recognized that by virtue of location, some conduit sellers could, by reflecting such advantage of location in their prices, exclude others from selling in certain markets; that their basing-point, delivered-price system offered compensations in the form of higher profits to the favorably located seller on sales made in his natural territory in return for refraining from pressing his advantage of location; that in order to maintain a price level high enough to permit each seller to sell in the natural territories of other conduit sellers, price competition must be restrained; and that the operation of their formula system of pricing enables each seller to quote to a prospective purchaser at any location the same price as that quoted by other sellers, through the use of the same formula, and thus bring about a condition of matched prices. Examples of the knowledge and purpose of these respondents appear in the record in various ways. For example, the president of Garland, in his testimony concerning the basing-point system and the location of Walker Brothers' plant at Conshohocken, only a few miles from Philadelphia, stated:

If we didn't have our present practice, why, Walker would walk away with all the Philadelphia business (T. 1487).

Another example appears in the testimony of the president of Walker Brothers, who, when asked if he knew of any method other than the basing-point, delivered-price system which would afford a similar degree of uniformity in price, stated:

404 A. Oh, I am not willing to admit that the Pittsburgh basic method of selling is the only way by which uniform prices can be put together. It is one.

Q. Well, can you name other ways in which you could have reached the same degree of identity and uniformity as you did here, through the use of any other method?

A. I imagine that there are a great many other ways of figuring uniform prices outside of the Pittsburgh basic method of selling, but I can't answer your question without distorting the picture. This is one method by which it is done. There must be others (T. 883-84).

(b) Certain aspects of respondent sellers' desire and purpose to restrain competition in the sale and distribution of conduit were openly revealed during the negotiations for

BLEED THROUGH – POOR COPY

and the administration of their Code promulgated under the National Industrial Recovery Act and through various activities claimed to be pursuant to such Code. For example, respondent conduit sellers' Code (Resp. Ex. 259) provided for the filing of prices, discounts, and terms of payment, for the relaying thereof to competitors, and for adherence thereto so long as the filing was not changed. Respondent F. C. Hodkinson, who was appointed by the board of directors of the National Electrical Manufacturers Association as supervisory agency for the division of the electrical manufacturing industry which included conduit, in his capacity as such supervisory agency, called upon Garland by letter dated November 29, 1933, for an explanation of an apparent departure from its filed prices in a bid to The Panama Canal. In replying, Garland explained that:

* * * our own price .1547 was in error, inasmuch as we used the 67¢ freight adder which at that time we thought was correct but now find that the less carload freight adder is 70¢, which hereafter will be used by us.

* * * * *

In the prices as quoted some confusion evidently exists as to the proper freight adder as several of the prices are slightly different from the correct which we figure should be .1554 (Com. Ex. 247).

405 In replying to Garland, Mr. Hodkinson stated in part:

The filing of price lists, if these lists happen to be uniform, will assure all uniform quotations made on any inquiry, whether from the Government or a private individual, but with the matter of the delivery charges left up in the air as it has been, there is room for differences. I am therefore calling for the filing of these delivery charge schedules (Com. Ex. 248).

The basis for pricing delayed deliveries of conduit on specific building contracts was determined as shown by the minutes of a meeting of RSCA on January 17, 1935, which read in part:

Upon motion made, seconded and carried, it was resolved that it is the understanding of each member of the Rigid Steel Conduit Association that any delivery of conduit upon any specific building contract, or order, after its six months expiration, shall be billed on the basis of current filed Card with N.R.A. Supervisory Agency, unless previously an extension has been granted by the Supervisory Agency under

the prescribed method of investigation and substantiation of the requirement of extension. And to eliminate confusion, each member shall file a list of all existing contracts on January 25th and February 25th, 1935 (Com. Ex. 3-B).

In their efforts to maintain identical prices and prevent purchasers from finding any advantage in dealing with one seller as against another, respondent conduit sellers did not stay within the provisions of their Code. An example of this appears in connection with bids made in February 1935 to the United States for supplying certain conduit for use in the Canal Zone. There were 30 bids submitted: 28 of these were each in the amount of $3,080; one bid was at a higher figure; and one bid, that of Home Lighting Company, a jobber located in Baltimore, was low at $3,075. Home Lighting Company received the award and sought to purchase the conduit from Cohoes, which was its regular source of supply. Before the order was shipped Mr. Hodkinson, in his capacity as supervisory agency under the Code, telegraphed Cohoes under date of March 28, 1935, in part:

Referring to your telephone message wish to inform you that as supervisory agency I protested to Washington bid submitted by Home Lighting Company * * * I have 406 had no reply and before you ship this specification on Home Lighting order the matter should be adjudicated at Washington (Com. Ex. 287).

Under date of March 30, 1935, Cohoes advised Home Lighting Company in part:

We are in receipt of your letter of March 27th, and while we fully appreciate your situation, we are powerless to ship this specification until we have authority to do so from the Supervisory Code Authority (Com. Ex. 289).

Home Lighting Company sought to purchase the conduit needed to fulfill its obligation under the bid from other conduit sellers. On April 5, 1935, it telegraphed Austin, as follows:

Advise Western Union can you make shipment in five days fifty thousand feet half inch hot dipped conduit (Com. Ex. 288-A).

On the same day Austin replied to Home Lighting Company that it could make the shipment, and added:

We sincerely hope to be favored with your order (Com. Ex. 291).

On the next day, April 6, 1935, Austin advised Home Lighting Company that upon receipt of shipping instruc-

tions the order was identified as a Panama Canal bid, that evidently Austin conduit was not specified in the bid and it would be difficult to change the brand with the Government, and concluded by saying:

In view of this being for the Panama Canal I believe it will be very essential that you furnish the brand of conduit nominated in your proposal to avoid complications with the governmental authorities.

We, therefore, regret exceedingly that we are unable to handle the order and beg to remain (Com. Ex. 292).

Home Lighting Company had secured an authorization from the Government purchasing agency on March 23, 1935, to supply Clayton Mark conduit "provided it complies with the specifications" (Com. Ex. 332). However, Home Lighting Company was unable to purchase the conduit necessary to fulfill its bid. It secured some conduit from other jobbers and the Government purchased the remainder in the open market and charged the difference in cost to Home Lighting Company.

407 It was impossible for the bid by Home Lighting Company to be in violation of the Code administered by Mr. Hodkinson because that company was not subject to that Code. In addition, at the time these events occurred, Executive Order No. 6767, dated June 29, 1934, was in effect and provided that in sales to instrumentalities of the Government a price as much as 15 percent below filed prices would not violate Code provisions concerning filed prices.

Paragraph Six: (a) The use of the same base prices and uniform delivery charge factors by the several respondent conduit sellers will, as a matter of simple mathematics, enable all such sellers to quote identical delivered prices to any given destination, provided the same railroad tariff rate is used by each seller in selecting the applicable delivery charge factor. Frequently, however, it is difficult to exactly determine the tariff rate and even experts sometimes differ as to the applicable rate. Mistakes by conduit sellers in the selection of the railroad tariff rate to be used in a particular instance were a fruitful source of differences in the delivered prices quoted.

(b) The record does not disclose the details of various steps taken by the respondent conduit sellers with respect to railroad tariff rates prior to 1936. In the beginning of the industry the conduit manufacturers who acted as converting and selling agents for pipe manufacturers used a freight bulletin on standard pipe prepared by National Tube

Company. Apparently such rates on pipe were used generally by conduit sellers and no freight bulletin on conduit was published until sometime after the organization of RSCA. During the Code period the problem of price differences resulting from variations in delivery charges was handled by the action of Mr. Hodkinson requiring the filing of delivery charge schedules in connection with the price-filing provisions of the Code. This was supplemented by the action of George A. Sicard, secretary of RSCA, in furnishing a tariff rate for the common use of members of RSCA in cases involving unusual destinations or rates. An example of this appears in the bulletin dated January 31, 1935, addressed by Mr. Sicard to members of the association, concerning bids to be opened February 11, 1935, for 50,000 feet of ½-inch galvanized conduit for The Panama Canal. He wrote:

The published freight rate to Cristobal, Canal Zone is 47½¢ per hundred pounds (Com. Ex. 419).

The results on this bid have been heretofore set out in subparagraph (b) of Paragraph Five.

408 (c) Sometime after its organization and before September 10, 1936, RSCA began the publication of freight rate bulletins for the common use of respondent conduit sellers in conjunction with the delivery charge pamphlets in ascertaining delivered prices to be quoted at the various destinations set out in the rate bulletins. Under date of September 10, 1936, RSCA published a rate bulletin entitled:

Supplement to rigid conduit freight rate bulletin dated April 25, 1935 to be used as a basis in determining delivered prices on rigid conduit—less-carload for rail station delivery including all truck deliveries from Pittsburgh or Chicago and Evanston to various destinations in Western and Central United States (Com. Ex. 74-Z26).

409 On October 9, 1936, I. A. Bennett, vice president of National Electric, addressed his sales representatives:

We are in receipt of a copy of letter, dated September 26th, sent out by the Triangle Conduit Company to their Sales Offices in which they enclose copy of the Rigid Steel Conduit Association Supplement on Freight, which takes care of store door delivery at the rates shown.

This company wants to follow these rates, and charge will be made on all shipments on Pittsburgh or Chicago base where Rigid Conduit is shipped by truck to a job site, or to the store door of jobber.

It is difficult to put into effect any new program as each customer naturally resists paying for something he has been getting for nothing. Therefore, you will unquestionably run up against the story that someone is not doing this or doing that, and therefore, we should not do it.

It certainly seems logical to equalize on freight and transportation service, and therefore, we sent you on October 6th, copies of the Rigid Steel Conduit Association Supplement and ask that you use this to familiarize your customers, where effective, with this tariff, and endeavor to standardize it (Com. Ex. 392).

The minutes of a meeting of RSCA on December 8, 1936, recite in part:

Chairman Bennett introduced the subject of the recently published freight supplement for discussion, and certain discrepancies were brought to light in the rates as published.

It was suggested that Mr. Kim confer with Mr. Donely, who compiled the supplement, with a view to having corrected certain errors which had been noted.

Further, it was voted to employ Mr. Donely to keep the supplement up to date in the light of such changes in existing rates as may be made from time to time (Com. Ex. 9-D).

410 The last rate bulletin issued directly by RSCA was dated January 1, 1937. Supplements to this rate bulletin, however, were issued directly by the association until the RSCA meeting of September 27, 1937, the minutes of which recite in part:

At a meeting earlier in the year, Chairman Bennett had been authorized to employ Mr. Donley as Traffic Manager for the Association, and, following discussion, it was voted to pay Mr. Donley's bill as submitted to Mr. Booth, and advise him that his services were no longer required.

It was then voted to establish a Committee on Traffic to consist of Messrs. Kim, Welsh and Matthews, of the National Electric Products Corporation, Youngstown Sheet and Tube Company and Central Tube Company respectively (Com. Ex. 22-D).

The rate bulletin of January 1, 1937, carried as a foreword:

Method of Figuring Delivered Price.

The freight rates listed herein are to be used to ascertain delivery charges in figuring F.O.B. destination prices to all points in the United States and their possessions.

Where the freight rates shown are from Pittsburgh, Pa., the Pittsburgh Basing prices must be used. If the freight rates shown are from Chicago or Evanston, Ill., the Chicago or Evanston basing prices must be used.

For an example: To determine the F.O.B. destination on ½" Sherarduct Conduit F.O.B. Fort Wayne, Ind.—C/L—Mill Shipment.

Pittsburgh Basing Card 74—	$4.67	per 100 ft.
Freight rate 27 cwt. or (delivery charge)	— .24	
	4.91	per 100 ft.

(Com. Ex. 79-Z127 and others).

Some of the respondent conduit sellers used and distributed to the trade the bulletins issued by RSCA; and some, of which General Electric is an example, had 411 bulletins separately printed which, though somewhat different in appearance, were identical in material particulars and obviously merely copied from the association bulletins.

(d) The rate bulletins and supplements issued directly by RSCA were prepared by Charles Donley, a traffic and rate expert in Pittsburgh engaged in the business of supplying rate information and other rate and traffic services to various business concerns and trade associations. Mr. Donley had furnished rate services to some of the individual conduit sellers prior to his employment by the association. On July 22, 1937, Mr. Donley addressed a letter to Mr. Booth, who was then acting as secretary for RSCA, with copies to the members of RSCA, in which he referred to his previous services, stated he understood the association would discontinue publication and distribution of a joint schedule, and continued:

May we suggest that it would be to the best interests of the individual members to prepare a freight rate schedule that would be distributed in the name of or by the individual member, such a schedule to contain the freight rates as they are not published, in carload and less carload, and

from the origins of Pittsburgh, Chicago and Evanston to the various destinations and to be published in such form as to reduce the number of pages and then to have it printed, as some of the companies are already doing.

I am also suggesting that this schedule should not contain any reference whatever to the methods of figuring delivered prices and in the place of being prepared and issued by the Rigid Steel Conduit Association, that it be prepared and distributed, as suggested above, by the individual company. I believe if these two changes were made it would be of much more value and of more practical benefit to all who are concerned.

I am taking the liberty of submitting a suggested title page as well as a second page which contains the changed statements from those that are shown in the present schedule. Also a third page giving an idea as to the method of showing the actual freight rates (Com. Ex. 401-A and B).

Thereafter, Mr. Donley, in compiling and publishing rate bulletins and supplements for the use of conduit sellers which were purchased and paid for individually by con-
412 duit sellers, advised and cooperated with Mr. Booth and with the transportation committee of RSCA. He wrote Mr. Booth, as executive secretary of RSCA, under date of August 11, 1938:

Confirming phone conversation today, wish to advise that our Bulletin of August 3, Subject 7080, Pick-up and Delivery Service Official Territory, was mailed (1 copy only) to all the firms on the list; namely:

M. B. Austin Company, Chicago.
Central Tube Co., Pittsburgh.
Clayton Mark & Co., Chicago.
Cohoes Rolling Mill, Cohoes, N. Y.
Fretz-Moon Tube, Butler, Pa.
Garland Mfg. Co., West Pittsburgh, Pa.
Laclede Steel Co., St. Louis, Mo.
Nat'l Elec. Prod., Pittsburgh.
*Steelduct Company, Youngstown.
Triangle Conduit, New York.
Walker Brothers, Conshohocken, Pa.
Youngstown S. & T., Youngstown, O.

* Steelduct Company are furnished with a copy of bulletins of general nature such as the one above mentioned, but they have not been furnished with any Conduit Rate Change Bulletins, as they did not have any printed when the last issue was prepared. Please advise if this firm should be furnished with Conduit Rate Change Bulletins from this office (Com. Ex. 390).

Under date of September 14, 1938, Mr. Donley wrote Mr. Booth as follows:

After you phoned us yesterday we got in touch with Mr. Kim regarding the store door delivery situation about which the Triangle Conduit and Cable Company have written you.

Based on that conversation, we are to submit to the Transportation Committee some figures to show what the approximate cost would be for making the necessary changes in the Rigid Conduit Bulletin. This will be supplied within the next day or so and we will then await advices as to what we should do (Com. Ex. 385).

413 Under date of November 24, 1939, Mr. Donley directed the printer as follows:

Enclosed are stickers for mailing revised pages to the rigid conduit schedule.

The following number of copies are to be mailed to respective companies:

Fretz-Moon Tube Co.	550
The M. B. Austin Co.	300
Garland Manufacturing Co.	280
Clayton Mark and Co.	825
Cohoes Rolling Mill Co.	600
Youngstown Sheet & Tube Co.	2200
Triangle Conduit & Cable Co.	1000
Central Tube Co.	660
Walker Brothers	500
Laclede Steel Co.	110

(Com. Ex. 373).

(e) The freight rate bulletins heretofore described were intended for use and used to provide respondent conduit sellers with common factors in determining delivery charges to be included in the price of conduit delivered at various destinations. They also designated the rate from one or the other of the basing points to each destination, thus indicating the base price applicable at such destination. In determining the controlling base as shown in these bulletins, Mr. Donley used an arbitrary figure of $4 per ton difference in base prices between Pittsburgh and Chicago, when in fact the difference between these base prices was generally slightly above or below $4 per ton. These bulletins could not be used for shipping purposes by a conduit seller whose plant is not located in Pittsburgh or Chicago,

BLEED THROUGH – POOR COPY

because those are the only points from which rates are shown in such bulletins. They are not adequate for shipping purposes even for conduit sellers whose plants are in Chicago or Pittsburgh, because they do not contain information affecting rates, such as routing, loading, minimum weights, and other data ordinarily needed for shipping purposes.

(f) The following respondent conduit sellers purchased or otherwise secured and used so-called rate bulletins prepared by Mr. Donley: Central Tube, Clayton Mark, Cohoes, Fretz-Moon, Garland, Laclede Steel, National Electric, Spang Chalfant, Inc., Steelduct, Triangle, Walker Brothers, Youngstown, and Austin. Rate bulletins distributed by Enameled Metals are either Donley bulletins or copied
414 therefrom; Laclede Tube used Donley bulletins secured by Laclede Steel; Republic and Steel and Tubes, Inc., used Donley bulletins secured by Fretz-Moon; Clifton copied its bulletins from General Electric, which in turn prepared or copied its bulletins from Donley bulletins. The above finding that Donley bulletins were copied by certain conduit sellers is in part based upon the identity of language, arrangement, destinations, and rates, as appears from a comparison of such bulletins with bulletins known to have been prepared by Mr. Donley.

(g) In preparing and selling the rate bulletins as aforesaid, Mr. Donley knew that they were not intended or adapted for use by the purchasers thereof as bona fide rate information for shipping purposes. He knew that they were intended for use as a common factor in pricing conduit according to a basing-point formula of pricing which included a differential of substantially $4 per ton between the Pittsburgh and Chicago bases, and he was necessarily aware that the base prices which came to his attention were uniform as among respondent conduit sellers and would therefore, through the application of a common rate factor, result in identical delivered prices at any given point.

Paragraph Seven: Following negotiations covering about two months, RSCA employed Herbert S. Blake and his company, OSC, to manage its affairs. After conferences with members of RSCA and an examination of merchandising policies and practices of conduit sellers, Mr. Blake, in collaboration with RSCA, undertook the formulation and execution of plans having the fundamental purpose of controlling certain conditions which tended to interfere with

and disturb the operation of the basing-point, delivered-price system in producing matched price quotations and prices to conduit purchasers. Many of these activities supplementing the pricing system were purported to be carried on in the name of the Robinson-Patman Act, which apparently was viewed by these respondents as a grant of authority for collective action to prevent any departure from uniformity in prices, discounts, terms of sale, and merchandising policies, rather than as being directed toward the preservation of competition for the benefit of the public. The principal matters which were subjects of collective action and were promoted by Mr. Blake and RSCA were the use of consignment contracts, protection contracts, and other means to control distributors and prices, the investigation and control of specific building contracts, so-called closed transaction inquiries, elimination of warehouses, uniformity of trade discounts, and classification of purchasers.

415 Paragraph Eight: (a) For a long period of time preceding the employment of Mr. Blake and OSC, all the respondent conduit sellers except Clayton Mark sold substantial quantities, and in several instances a major part, of the conduit each handled to and through distributors pursuant to so-called consignment contracts. Little serious effort had been made to enforce price maintenance under these contracts, however, apparently because the distributor agents were obliged to compete with wholesalers who purchased conduit and were at liberty to use their own judgment as to the prices which they quoted. These distributor agents also sold conduit from time to time at prices which did not accurately reflect the use of the basing-point pricing formula. Such price variations had a disturbing influence upon the entire price structure. During the Code period means of controlling the prices at which wholesalers sold conduit were frequently considered. Lack of effective control under the Code was deplored and attention was given to the possibility of securing a uniform policy on this subject by all conduit sellers. The minutes of a meeting of RSCA on April 4, 1935, recite in part:

The matter of a Sales Agent Contract was discussed at length and upon motion made, seconded and carried, Messrs. Hodkinson, Walker and Sicard were appointed as a Special Committee to consider this matter further (Com. Ex. 4-B).

BLEED THROUGH – POOR COPY

(b) It was a part of the plan engaged in by RSCA under the leadership of Mr. Blake to stabilize the price structure in the industry through the general use of consignment contracts which were to be made uniform and enforced according to their terms. Pursuant to this plan, Mr. Blake called upon the association members for copies of their forms of contracts with distributors, analyzed them, and prepared a tentative draft of a uniform consignment contract which was considered and discussed at length by the board of directors of RSCA. The minutes of a meeting of the board on November 20, 1936, recite in part:

It is the intention of the Board of Directors to try and have in the hands of the members a Uniform Jobber Agency Contract, a Uniform Specific Building Contract, and a set of Fair Trade Practice Rules for consideration of the Association at its next meeting to be held on Tuesday, December 8th, so that the Industry, if it so decides, could put these uniform instruments into operation by our next reporting period—namely, December 25th (Com. Ex. 8-C).

416 The minutes of a meeting of RSCA on December 30, 1936, report that it was called to study the "recommendations relative to the Distributor Agents Contracts and other suggested forms in order to enable the manufacturers to adopt them without further delay if they cared to do so" and that Mr. Blake explained a number of changes which had been made (Com. Ex. 10-D).

(c) One of the necessary steps was to enlist the cooperation and assistance of wholesalers, and this was done. The report of the conduit committee of NEWA on its meeting of September 28, 1936, at which representatives of Central Tube, Fretz-Moon, Laclede Tube, National Electric, Triangle, and Walker Brothers were present, includes the following:

Inasmuch as several manufacturers have expressed the opinion to various members of the Committee that the Conduit Industry can be placed on a sound economic and service basis only by Wholesalers acting as agents for the manufacturers, with consigned stocks, your Committee is of the opinion that this Association should recommend that the Conduit Manufacturers consider the advisability of selling conduit on a consignment basis (Com. Ex. 39-A).

The regular procedure of the conduit committee of NEWA, referred to above, is for the members of that

committee to have a meeting in the morning and this is followed by an afternoon meeting to which representatives of the various respondent conduit sellers are invited.

On January 14, 1937, H. G. Morrow of Central Tube wrote H. S. Walker of Walker Brothers in part:

Speaking for our own company, we are not holding back to see what other people are doing, believing that under Blake's leadership each member of the Association is sincerely in earnest to put his own house in order.

Here is what we have done—

1st—The Board recommended, and the Industry approved, a uniform contract with manufacturers' agents. We sent these contracts out and our agents have all signed them.

417 2nd—The Board recommended, and the Industry approved a form of specific building contracts, covering three types. We yesterday OK'd the proofs of these contracts and they will be sent to our district offices this week, to be used in connection with all future jobs.

3rd—Mr. Blake approved an addendum to our regular consigned stock contract which gives the same effect to resale price control as the agency contract which was adopted by the Industry. These forms are now being filled in and will be sent to our district offices this week, for presentation to the jobbers for signature.

4th—Assuming that all the manufacturers are sincere in regard to building contracts, we have acted on Blake's recommendation in the case of all contracts reported to us, with the result that we have already cancelled upward of 900 tons.

5th—The joint meeting of the Board of Governors and some of the other members of the Industry with representatives of the Jobbers' Association, in my opinion, did more to get the jobbers in a frame of mind to cooperate with us than anything we have heretofore done and it is my idea that at the next general meeting of the Association, some definite program can be worked out which will be satisfactory to the manufacturers and pleasing to the jobbers.

I think the foregoing accomplishments since the employment of Blake show a very satisfactory rate of progress, in view of the divergent opinions of many manufacturers on certain fundamental problems, to say nothing of the pet peeves which had grown up between manufacturers.

BLEED THROUGH – POOR COPY

So far as our company is concerned, we are going ahead, in good faith, with this whole program, with the full knowledge that should our competitors not follow an approved program, we can always turn back and make our marketing conditions conform exactly to those of our competitors (Com. Ex. 577-A and B).

418 At a meeting of RSCA on January 27, 1937, Mr. Bennett of National Electric made an extended statement concerning the chaotic conditions which had developed in the industry, referred to the plans made with Mr. Blake and OSC to obtain better results, and stated that he was going to announce a policy to his sales department and customers, with copies to competitors, under which:

* * * It is our intent and purpose to obtain the support of our customers for this policy, and in our program we will establish such trade practices, customs, and forms of contracts as we deem necessary to protect our company from fraudulent manipulations (Com. Ex. 11-H).

The minutes of the meeting record that thereafter:

There was a lengthy discussion of the various recommendations heretofore made by Organization Service Corporation, during which Mr. Blake stated that he had been informed that Messrs. Garland, Walker, Morrow, Bennett and Barton [all of whom were present at this meeting] had adopted for their individual companies many of the recommendations.

The discussion brought out the fact that all members were revising their merchandising procedure to include as many of the recommendations as were applicable to their individual needs (Com. Ex. 11-I).

The report of the conduit committee of NEWA dated May 24-25, 1937, at which meeting representatives of Central Tube, Enameled Metals, Fretz-Moon, General Electric, National Electric, Steel and Tubes, Steelduct, Triangle, Youngstown, and Walker Brothers were present, includes the following:

It is very gratifying that the manufacturers are offering electrical wholesalers an equitable form of sales agency agreement.

Since coming to Hot Springs we have learned that quite a number of wholesalers have, for some reason or another, not executed an agency contract. No one believes the present contract is perfect, but many of us are sure it is better than anything we have had previously. If the pres-

ent contract is made effective it can be bettered. If it is not supported, it will fail (Com. Ex. 39-B).

419 The report of the same committee on its meeting of October 19, 1937, states in part:

On Wednesday morning, October 20, 1937, we had a further meeting at which several of our manufacturer friends entered into our discussions quite freely. More than ever your Committee decided on urging the wholesaler's whole-hearted cooperation in the sales agency plan of selling conduit. Don't abuse the plan by fictitious contracts or amounts of conduit needed. It ought to pay dividends to you in the near future (Com. Ex. 39-C).

The report of this committee on its meeting of May 23, 1938, attended by representatives of Central Tube, Enameled Metals, Fretz-Moon, General Electric, National Electric, Steelduct, Steel and Tubes, Inc., Walker Brothers, and Youngstown, states in part:

The results of the questionnaires sent out by NEWA a few months ago show that 92% of those replying were of the opinion the sales agency plan for selling conduit represents an improvement over previous methods. The membership also recorded that in most instances manufacturers were cooperating to make the sales agency plan effective (Com. Ex. 39-D).

The report of the meeting of the conduit committee of May 22, 1939, attended by representatives of Central Tube, Enameled Metals, Fretz-Moon, General Electric, National Electric, Steel and Tubes, Inc., Steelduct, Triangle, Walker Brothers, and Youngstown, recites in part:

While due to a combination of circumstances beyond the control of the manufacturers and wholesalers, the sales agency plan has failed to operate as originally designed, it is the definite desire of both industry groups that the plan be retained as a basis upon which to build a more satisfactory sales picture in connection with our conduit business (Com. Ex. 40-C).

The conduit committee report of October 17, 1939, attended by representatives of Clayton Mark, Enameled Metals, Fretz-Moon, General Electric, National Electric, Steel and Tubes, Inc., Steelduct, Triangle, Walker Brothers, and Youngstown, contains the following:

420 As reiterated on the occasions of our Chicago and Hot Springs meetings, your Committee again informed

the manufacturers that wholesalers heartily approved the sales agency plan in connection with the distribution of rigid conduit. It is the opinion of your Committee that the general situation as it exists today is such that it appears the time is appropriate to give careful and serious consideration to the definite adoption of all the desirable features of this plan, and that the manufacturers study the matter with a view to this and in the reasonably near future. We were pleased during the course of our discussion with the manufacturers to find that their opinions coincided with the thinking of your Committee and encouraged to believe some action along these lines might soon be expected (Com. Ex. 41-A).

(d) Respondents Cohoes, Enameled Metals, Fretz-Moon, Garland, National Electric, Steel and Tubes, Triangle, Walker Brothers, and Austin adopted the Blake form of consignment contract, either without change or with insignificant changes. General Electric, Laclede Tube, Clifton, Steelduct, and Youngstown already had in use forms of consignment contracts which provided for price control, and they continued the use of those forms without adopting the Blake form. Spang Chalfant, Inc., when it entered the conduit business, adopted consignment contracts but not the Blake form.

(e) After the adoption of the uniform consignment contracts, the next logical step was taken to secure maintenance of prices according to the basing-point, delivered-price formula under these contracts. Various forms of pressure were exerted upon both conduit sellers and conduit wholesalers to that end. Among the steps taken was the request of the conduit committee of NEWA that conduit sellers insist that distributors observe the prices specified in the contracts and refuse to supply conduit to those who did not. Herbert S. Blake wrote the various conduit sellers urging that they terminate the contract of any distributor who failed to follow the manufacturer's instructions. Some of the conduit sellers wrote to their distributor agents insisting on full observance of prices. For example, in writing an agent on June 8, 1938, Garland stated in part:

We do not wish to threaten, but we are definitely going to cancel some of our distributor agent's agreements if they do not carry out our instructions, and if they 421 are known as price cutters, it is going to be very hard

for them to sign up new agreements with ourselves or others (Com. Ex. 555).

The RSCA, in connection with reports of price cutting by distributors, wrote conduit sellers that they were responsible for the actions of these distributors and should insist upon distributors maintaining the manufacturers' "published position." Some distributors' contracts were in fact canceled because of their having cut prices.

Paragraph Nine (a) Electrical contractors are called upon to submit bids for suuplying and installing electrical wiring and equipment, and frequently a considerable period of time may elapse between the submission of a bid and the completion of the job. Consequently, such contractors desire protection against an advance in the price of conduit during that interval. It has been customary for conduit sellers, either directly or through their distributors, to protect the price to electrical contractors on specific construction projects. In actual practice these so-called specific building contracts have not amounted to more than options, because the conduit seller does not insist upon the contractor taking the conduit and if there is a price decrease the contractor receives the benefit thereof. The result has been that contractor sometimes entered into contracts with more than one conduit seller, each for the full requirements on a particular job, or took a contract for substantially more conduit than actually needed to complete the job purported to be covered by the contract. Duplicate contracts and excess amounts of conduit provided in contracts were of substantial importance to respondent conduit sellers only after a general increase in the price of conduit. Following a price increase, excess quantities of conduit covered in such contracts in effect constituted a floating supply of conduit available at a lower price. The contractor might transfer such excess to some other job or possibly sell it at a profit. The effect of this floating supply was to create irregular price conditions and to make it difficult for conduit sellers to maintain an advance in price.

(b) The practices existing under the so-called specific building contracts were considered by the conduit committee of NEWA and the report of its meeting of May 4, 1936, recommended:

To correct the waste and unfairness of the building protection contracts your committee recommends: 1. That

the manufacturer consider the economic value and the
422 advisability of limiting such contracts to building operations requiring at least one carload of conduit; 2. That efficient means be established to determine the actual amount of conduit required; 3. A bureau or bureaus be established to avoid the waste and unfairness of having so many protection contracts for a given building operation.

Both the manufacturer and the wholesaler must, of course, abandon unfair methods to accomplish the desired end (Com. Ex. 40-A).

Under the leadership of Mr. Blake, as a part of its program to maintain prices and minimize competition in the industry, RSCA undertook the collective preparation of a form of so-called specific building contract to cover sales of conduit to contractors for use on a particular project and the establishment of means for investigating and controlling the use of such contracts. In this program Mr. Blake and RSCA had the cooperation of NEWA.

(c) A draft of a uniform contract was prepared by Mr. Blake through procedure similar to that followed in preparing the uniform consignment contract. The more significant features of this contract form were the detailed identification of the job, including, in addition to its name and location, the name and address of the owner, of the architect or engineer, and of the general contractor; the warranty by the buyer that the conduit will be used only on the job described; the prohibition against diversion; the provision that the price and terms are to be the seller's "regularly published prices and terms as shown by Card No. ..... dated .....''; the non-assignability of the contract; and the requirement for a certification by the architect or engineer that the quantity of conduit specified in the contract for the particular job is correct. Clifton, Garland, Enameled Metals, National Electric, Steel and Tubes, Fretz-Moon, and General Electric adopted the Blake form, in some instances with small alterations. Youngstown continued the use of a form of contract previously adopted which, however, contains provisions substantially the same as the Blake form except the certification by the architect. When Spang Chalfant, Inc., entered the industry, it adopted the Blake form. The record does not disclose whether the other respondent conduit sellers did or did not adopt the Blake form.

(d) Arrangements were made by RSCA and OSC for the latter to investigate or arrange for the investiga-
423 tion of the so-called "validity" of specific building contracts. When this activity was initiated, the conduit sellers sent lists of such contracts as they had in force to OSC and thereafter sent copies of new contracts from time to time as they were negotiated. The forms supplied to conduit sellers for the initial reporting called for the following information on each contract: The name of the reporting member, date of contract, location of job, name and address of the contractor, jobber, and architect, amount of conduit, and the price provided in the contract. The filing of copies of subsequent contracts disclosed similar information. Each conduit seller bore the cost of the investigation of the contracts he reported and the results of such investigations were transmitted by Mr. Booth to the reporting conduit seller and such others as were interested in the particular job or inquired concerning it. The nature of the practice is best shown by the history of an investigation of an actual contract. Central Tube reported a contract for 110 tons of conduit for the Teaneck Armory, Teaneck, New Jersey. Mr. Booth reported the result of the first investigation made of this contract to Central Tube on January 14, 1937, which indicated that 110 tons would be required and that Central Tube conduit supplied through Westinghouse Electric Supply Company to Badaracco & Company as contractors would be used. He recommended reinvestigation in 90 days. On October 20, 1937, Central Tube asked that reinvestigation be made. The report of this recheck indicated that the contractor was using both Central Tube and Youngstown conduit and that 80 tons would be sufficient. In advising Central Tube of the result of this recheck under date of June 21, 1937, Mr. Booth stated in part:

If you wish to have me, I shall ask Youngstown how much material they have covered on this job as I am sure you will both be glad to cut your allotment in half in view of the card on which taken.

In the meantime, I am marking my records O. K. 80 tons, cancel 30. If you wish me to go into the matter further please advise (Com. Ex. 487-I).

The contractor and the agent for Central Tube reasserted that 110 tons would be required. Further investigation was made, the result of which showed that the con-

tractor insisted that the full tonnage would be required, while the investigator reported he thought his original estimate of 80 tons would be correct. In reporting this to Central Tube, Mr. Booth wrote in part:

424 I feel that you should respect our report of June 21st and limit the job to 80 tons or send a representative of your company or make an appointment for a representative of your company and Mr. Lodge to visit the job together but without a representative of the jobber or your New York agents (Com. Ex. 487-D).

Central Tube gave way to Mr. Booth's insistence and directed its agents, sending a copy of the direction to Mr. Booth:

Do not permit Westinghouse to deliver more than 80 tons against this contract and if after the 80 tons are delivered they need additional conduit we will investigate the matter further (Com. Ex. 487-B).

(e) This activity was supervised and directed by Mr. Booth, and the collective pressure exerted through him resulted in cancellations and partial cancelations of contracts for large quantities of conduit. From time to time during the progress of these investigations Mr. Booth reported to meetings of RSCA the results attained. A cumulative report made by him to the association appears in the minutes of a meeting of RSCA on July 13, 1937, and shows in part that 1,893 contracts were investigated, that these contracts covered 48,509 tons, that cancelation of 27,166 tons resulted, and that the percentage of tonnage canceled to the tonnage investigated amounted to 56 percent (Com. Ex. 20-H).

Paragraph Ten: (a) The amount and terms of trade discounts to be granted by conduit sellers was the subject of collective consideration by such sellers and conduit wholesalers. NEWA made studies to determine an average cost of distribution of various electrical goods, including conduit, and made recommendations based thereon concerning the trade discounts or margins which wholesalers should receive. This was followed by the action of I. A. Bennett, chairman of the board of directors of RSCA, in calling a conference between conduit sellers and conduit wholesalers. In extending an invitation to the managing director of NEWA to this meeting, Mr. Bennett stated in part:

The Rigid Steel Conduit Association have authorized

the Board of Directors to make a study of the cost of distribution of Rigid Steel Conduit (Com. Ex. 46).

425 (b) NEWA called together in New York City the members of its conduit committee for the purpose of attending the joint session with conduit sellers, and then the managing director of NEWA advised the chairman of its conduit committee in part:

Since issuing this call we have learned, however, that the proposed conference between manufacturers and distributors is wider than we had supposed, that, in fact, the manufacturers have invited to be present at the conference various distributors in their individual capacities as well as representatives of various local wholesaler Associations.

Under the circumstances I believe that you will quite agree that the National Association cannot very well take part, through its representatives, in a conference of this kind.

• • • • •

When you adjourn as a Committee, those of you who plan to take part in the proposed conference with manufacturers of Conduit will, of course, attend such a meeting with the manufacturers in your personal and individual capacities and not as official representatives of the National Electrical Wholesalers Association (Com. Ex. 47).

One of the principal subjects of discussion at the meeting was the costs to wholesalers of doing business as shown in the cost study made by NEWA. The results of this joint meeting came before RSCA at its meeting of January 27, 1937, and the minutes of that meeting show that L. R. Quinn reported in part:

A brief resume of what transpired at the meeting of January 6, where various individuals representing manufacturing companies, jobbing companies and jobbers' associations met to discuss putting into effect the request of the jobbers made at the N. E. W. A. convention in Buffalo during October.

• • • • •

After a thorough analysis of what the various jobbers present had to report, it seems to be the consensus of opinion that consideration should be given to the various brackets as follows:

426 6%—for carload and over.
17%—5,000 pounds to carload.
22%—1,000 to 5,000 pounds.
25%—Under 1,000 pounds.

Further, it was suggested that these percentages be based on the Pittsburgh value for each class as published and not include freight (Com. Ex. 11-E and F).

(c) At the time of the joint conference on January 6th and of the RSCA meeting of January 27th, price cards numbered 74 issued by the various conduit sellers were in effect, quoting only carlot prices on conduit with certain provisions for trade discounts or agent's compensation. The following month respondent conduit sellers issued their price cards numbered 75, and these cards quoted conduit prices in four columns. Using ½-inch galvanized conduit, Pittsburgh base, as an example, the prices per hundred feet were $4.72 in carlots, $5.35 on quantities between 5,000 pounds and carlots, $5.69 on quantities between 1,000 and 5,000 pounds, and $5.92 on quantities less than 1,000 pounds. The trade discounts or agent's compensation provided by each conduit seller by card No. 75 differed from those previously in effect, but were identical as among the various conduit sellers, and in general outline followed the plan reported by Mr. Quinn as representing the "consensus" of opinion at the meeting of January 6th.

Paragraph Eleven: (a) As a further step in their plan for maintaining price uniformity in accord with the pricing plan used in quoting conduit prices, RSCA instituted a system of investigating the prices at which specific sales were made, as well as the prices quoted. When a conduit seller lost an order and suspected that this was the result of a price cut by some one else, he could have an investigation made through OSC which would supply him with the information developed, and the same information was supplied to any other conduit seller who desired it or was interested in the particular transaction. The forms used in requesting, acknowledging, and reporting the results of these so-called "closed transaction" investigations were prepared by Herbert S. Blake and OSC and approved by RSCA.

(b) The real nature of these investigations can best be understood through an examination of a specific instance. On June 30, 1937, National Electric sent to Mr. Booth a tabulation of the bids made to a Philadelphia school district showing the amounts bid by "West Phila. Elec. Sy., Silvers Elec. Sy., Royal Electric, Gold Seal Elec., W. A. Leiser," and stated: "14 Other bidders quoted

427 (Correct Price)," and then set out the prices said to be "correct" (Com. Ex. 489-C). Under date of July 2, 1937, Mr. Booth acknowledged this on the usual form and sent out form inquiries to conduit sellers identifying the transaction and asking for information as to the connection with the transaction of each concern addressed. As a part of this inquiry he included the actual bids of the parties as reported by National Electric and made the statement:

These are not in accord with card 76. If any of the foregoing are handling your material, you should call this bid to their attention as you will be liable under the Robinson Patman Act for the failure of these people to maintain your published schedule (Com. Ex. 489-D and others).

Central Tube replied: "We do not sell any of these jobbers and have not quoted through them"; Cohoes replied that it did not receive the order and stated: "We have advised our jobber that the resale must be maintained especially on all public bids in future"; Enameled Metals reported: "We did not quote"; Steel and Tubes and Fretz-Moon answered: "We do not sell Fretz-Moon to any of these"; Garland, in reporting, inserted the names of the conduit sellers whose materials were quoted on; General Electric replied: "Do not sell them"; Clayton Mark reported that it did not receive the order; National Electric replied: "Do not sell any of those listed"; Steelduct reported: "None handling ours"; Triangle reported: "Unfortunately (maybe) the low bidder is not our baby. We do sell Gold Seal but not lately"; Youngstown reported: "Not Youngstown"; and Walker Brothers reported that it received the order "and cancelled our contract as per letter attached." The letter of July 2, 1937, from Walker Brothers to the successful bidder advised of the cancelation of the contract because of failure to "observe our prices, selling terms, and other conditions of sale" (Com. Ex. 490-K). Mr. Booth wrote Walker Brothers on July 21, 1937, and inferred that Walker Brothers should not have supplied the material to West Philadelphia Electric Supply to fulfill its bid. Walker Brothers replied that an unsuccessful effort had been made to get this bidder to withdraw its bid, and stated:

We don't feel that it is good policy to refuse to furnish material on a public bid unless the jobber in quoting re-

flects a primary price of less than card 76 but we do believe that when a jobber cuts our price and we then
428 should cut him off and in this way teach him to have some respect for our prices without getting ourselves into an inquiry involving the validity of price control (Com. Ex. 490-M).

On July 26, 1937, Mr. Booth advised National Electric of the results of this investigation, that Walker Brothers had canceled their contract with West Philadelphia Electric Supply, and continued:

Since then I understand that on another public bid, West Philadelphia was right on the line but they no longer have a consigned stock of Walker conduit. They are however, distributor agents for two other manufacturers, so they will have conduit on consigned stock (Com. Ex. 490-F).

On the same date Mr. Booth similarly advised Garland of the results of the investigation and also said:

I understand that these people also have a stock of your conduit on consignment and hope you will see to it that they do not violate your agreement in any respect. Probably they have learned their lesson (Com. Ex. 490-C).

(c) Respondent conduit sellers have contended that these "closed transaction" investigations constituted proper activity necessary to enable sellers to secure information as to the condition of the conduit market. The Commission finds however, that in conception and execution these investigations amount in fact to a sophisticated form of price maintenance through united action by means of which a conduit seller who does not maintain prices and require his distributors to do the same is exposed to his associates and to the force of collective pressure, with the effect of tending to prevent departures from the prices established pursuant to the pricing formula.

Paragraph Twelve: From time to time respondent conduit sellers supplemented the restraining effects of their general practices affecting price by more direct action. The scope and nature of these activities are indicated by many exhibits in the record, among which are those set out below. On October 13, 1937, Garland wrote one of its agents in part:

Yours of October 8th was duly received and we held same over for the reason that we had our Industry Meeting yesterday in Pittsburgh.

429 The manufacturers are doing their very best to stick to Card 76 on all new business and they believe it can be done. A few of the manufacturers made the statement that they had no difficulty whatever in obtaining Card 76 in the Metropolitan District. This is what we are aiming at, and it is our belief that the New York market will show a decided improvement from now on (Com. Ex. 541).

On June 7, 1938, Triangle wrote Austin in part:

You received our wire today with regard to the importance of strict adherence to Card 76 prices by all of our conduit distributors.

It is my understanding that there will be a decided improvement in the competitive situation on all makes of conduit. * * * I have talked the matter over with several of our competitors and it is my understanding that they are taking similar action * * * (Com. Ex. 448).

On June 8, 1938, Enameled Metals wrote a wholesaler in part:

First, we have been assured that the McCarthy Brothers & Ford-Lang deal has been straightened up. At least Youngstown has assured me that it has.

* * * We were directly told that if we wished to have a supply of pipe, we would have to maintain our resale. We have reason to believe that other Manufacturers sent out the same instructions to their agents that we did, and we sincerely trust that an honest effort will be made to hold Card 76. * * * (Com. Ex. 531-A).

An agent of Garland, in writing to that company under date of June 22, 1938, stated in part:

I attended another meeting of the labeled conduit manufacturers today at the New York Athletic Club. In attendance were Robert Milford of Steel Duct, Milton Smith of Enameled Metals, J. Hawks of Triangle, Newt Walker of Walker Brothers and J. Carroll of National Enameled.

430 Several projects were discussed as to prices and agreements that had been made but nothing was pinned on to any of those present, which was in accordance with our agreement to maintain Card 76 on any new project that might come up after our first meeting (Com. Ex. 558).

The contract checking and "closed transaction" inquiries carried on by RSCA through OSC and Robert S. Booth were closely interwoven with other price maintenance

activities. An example of this appears in an interoffice memorandum by Garland dated July 8, 1937, reading in part:

Booth called up late yesterday afternoon and got me at home. He said that he was telephoning all manufacturers, because three or four manufacturers had called him asking his ideas on continuing to sell definite carload orders on the basis of Card 75. He called my attention very definitely to the fact that protection orders of this type, not for Specific Buildings and not covered by Specific Building contracts, were only good for ninety days; and we were discriminating against other customers if we supplied any of this material. I told him it was my understanding that we had to ship this material before July 1st, and he said that this was true. He then asked me point blank if we intended to ship any more of such carload business, and I told him we were all through with it. * * * (Com. Ex. 536).

Another instance appears in a memorandum from Mr. Booth to Garland under date of December 27, 1937:

In further connection with the statements made by Mr. Leiser, one of which involved Philip Cass, the report was that Enameled Metals had offered this party 10% inside, beyond card 76. Following is a reply from Major Quinn:

"Philip Cass, although a personal friend of mine, is one of the damnest liars that ever lived. He used to be our customer. We have sold him $700.00 worth in the last six (6) months. He is apparently buying from Garland. He is always making some kind of statements about what he could buy material for. I insist that the man that made this complaint go back to Mr. Cass and tell Mr. Cass that if he made the statement that we had quoted him a 10% inside that Mr. Quinn says he is a plain liar. He is probably trying to chisel another Manufacturer. We have made no inside offer of any nature to Mr. Cass or anybody else."

431

I have already reported to you in connection with the Philadelphia Electric job on which Walker was involved.

I have asked for more definite information as to where Triangle was quoting off card 76 in Philadelphia as claimed by Mr. Leiser; this request having been made on December 22nd.

If you will furnish me with this information, I will be glad to follow through on it (Com. Ex. 551).

Paragraph Thirteen: (a) The members of RSCA, through the medium of that association, engaged in collective activity directed to the classification of customers and to determining, upon the basis of collective opinion, whether or not particular concerns were entitled to be considered and treated as wholesalers. This activity is shown by the record to have been carried on at least as far back as 1934. Instances of these activities appear in the correspondence of George H. Sicard, then executive secretary of RSCA. Under date of November 28, 1934, Mr. Sicard addressed an inquiry to Mohawk Tube Company, Cohoes, New York, stating the course that should be followed in the case of a particular concern, as follows:

Have you put in a consigned stock with the Marshall Field Company in Chicago? If so, I don't see how they can qualify under your jobber's definition. Will you please advise (Com. Ex. 445).

A similar instance is shown in Mr. Sicard's letter of December 3, 1934, to the same company:

Are you selling Glen Alden Coal Company, Eastern Pennsylvania as a jobber. I certainly cannot understand it if it is so because they are 100% users.

Will you let me hear from you (Com. Ex. 444).

Mohawk replied under date of December 4, 1934:

432 Re: Glen Alden Coal Company.

In answer to yours of December 3rd, kindly note we are selling these people as users and not as jobbers (Com. Ex. 443).

Under date of December 11, 1934, Mr. Sicard addressed inquiries to the members of RSCA reading:

Will you be good enough to advise me whether you consider the Hershy Lumber Company, Hershy, Pa., as a user or as a jobber.

Will you simply answer on the bottom of this sheet and also I would appreciate it if you would tell me whether this company is one of your customers (Com. Ex. 440).

On December 30, 1934, Mr. Sicard wrote the members of RSCA:

You will recall that in November I wrote to you asking you for the names of concerns in the New England territory who in your opinion did not qualify as jobbers under the Rigid Steel Conduit Association definition.

BLEED THROUGH – POOR COPY

I have also received from New England a copy of the list of companies recognized as wholesalers (jobbers) by the Electrical Manufacturers Representatives Club of New England and the Northeastern Electrical Wholesalers Association. This list was compiled jointly by the two associations given above.

From the preliminary investigation it would appear that concerns listed on the attached sheet are considered by some members of the Associations as jobbers, although they do not qualify under the Association definition.

Would you be good enough to tell me by return mail which of these companies you sell and whether you consider them as wholesalers under our definition and why.

When these replies are received I will take the matter up with each of you individually (Com. Ex. 430).

433 On February 6, 1935, Mr. Sicard wrote the members of RSCA in part:

The Rigid Steel Conduit Association is extremely anxious to have a definite authentic list of all wholesalers or jobbers in the United States of America.

Will you send me for confidential compilation a list of all your customers to whom you extend jobbers or wholesalers compensation service commissions.

When these lists are received from all of the members, they will be compiled by states and cities. Naturally, no manufacturers name will be used in connection with any company on such list (Com. Ex. 413).

On February 20, 1935, Cohoes replied:

In conformity with yours of February 6th we are enclosing list of jobbers (Com. Ex. 412).

On March 13, 1935, Mr. Sicard addressed the members of RSCA as follows:

The results of the questionnaire regarding Pusey and Jones was that no manufacturer has sold these people. We are investigating further (Com. Ex. 435).

(b) When RSCA, with the assistance of Mr. Blake, prepared the uniform consignment contract heretofore discussed, a provision was inserted whereby the distributor agent, in executing the contract, represented that he conducted a warehouse suitable for carrying a stock of conduit and accessories in sufficient volume and range of sizes and types adequately to serve the territory in which he operated, that he regularly employed a force of salesmen, and that he did not sell as a contractor or otherwise

in significant amounts direct to the general public or to individual ultimate consumers. These provisions reflect the more important qualifications required by NEWA as a prerequisite to membership, but the NEWA definition is in more detailed form. Membership lists of NEWA are available to conduit sellers on request.

(c) After the employment of—OSC and Herbert S. Blake, RSCA continued the practice of seeking the collective opinions of its members as a guide to individual conduit sellers in classifying purchasers. This is illus-
434 trated in the case of Sanborn Electric Company of Indianapolis, Indiana. On March 15, 1937, Steel and Tubes, Inc., wrote Fretz-Moon that Clayton Mark recognized Sanborn Electric Company as a wholesaler of conduit and stated that this concern was strictly an electrical contractor. Fretz-Moon transmitted this inquiry to R. S. Booth, secretary of RSCA, who, on March 22, 1937, sent a questionnaire to members of RSCA, as follows:

Subject: Sanborn Electric Company, Indianapolis, Indiana.

I have been asked to ascertain the status of the above company; that is, whether they are treated as Wholesalers or Contractors.

Please reply hereon, returning this sheet to me stating how you treat this company (Com. Ex. 491-C and others).

The record contains the replies received from Central Tube, Cohoes, Enameled Metals, Garland, General Electric, Clayton Mark, National Electric, Steelduct, Triangle, Walker Brothers, and Youngstown. Mr. Booth, under date of June 24, 1937, advised Fretz-Moon as follows:

Some time ago you sent me a memorandum from Steel & Tubes covering the status of Sanborn Electric Co., Indianapolis, Ind.

The report was that Clayton Mark Co., recognized Sanborn as a wholesaler whereas in the opinion of Steel & Tubes they are strictly electrical contractors.

This inquiry was sent to all members in addition to Clayton Mark and it is the opinion of the majority that they are contractors but Clayton Mark claims that his Jobber Purchase Agreement contract covers this situation and if any part of their sales is on other than a wholesale basis, they settle at the contractor's price.

There is some justification apparently in the position he takes as you will note from Mr. Walker's reply that

BLEED THROUGH – POOR COPY

the Directory of the Wholesalers Magazine states that these people do about 70% wholesaling. A majority of these dual accounts are very bothersome and I presume they will continue to be.

435 You will notice that no reply is enclosed from Laclede. However Mr. Oberhauser informed me yesterday by telephone that he knew nothing about this transaction.

Kindly return the papers to me when you are through with them with any comment you may care to make (Com. Ex. 491-A).

Paragraph Fourteen: It was formerly the practice of conduit sellers to maintain warehouse stocks of conduit in many large cities. They made shipments of conduit to such stocks in carload lots and reflected the benefit of the lower carload freight rate in the price on warehouse sales of less-than-carload quantities of conduit to small wholesalers. This practice was a source of dissatisfaction to large wholesalers who were able to buy in carlot quantities but secured no advantage thereby in their competition with small wholesalers who purchased in small quantities from warehouse stocks of conduit sellers. In addition to objections by large wholesalers to that practice, the maintenance of such warehouse stocks created competitive difficulties among conduit sellers. By means of collective action, with the aid and cooperation of NEWA, respondent conduit sellers were able to, and did, discontinue the maintenance of warehouse stocks except on the Pacific Coast. Some of the activities of respondents concerning warehousing are indicated in the extracts from the record which follow. The report of the conduit committee of NEWA on its meeting of May 4, 1936, in discussing unsatisfactory conditions in the conduit business, attributed them in part to "manufacturers' uneconomic local warehouse stocks" and said in part:

Last year your committee recommended "the discontinuance of manufacturers' local warehouse stocks for the reason, among others, that sales and deliveries out of these stocks through warehouses or through agents result in unfair price discrimination against those wholesalers who do their own warehousing and otherwise perform the full distribution service for the manufacturer" (Com. Ex. 40-A).

The report of the conduit committee of its meeting of September 28, 1936, recites in part:

It is very gratifying to your Committee to be able to state that manufacturers have discontinued local
436 warehouse stocks in all sections of the country except the Pacific Coast. • • • (Com. Ex. 39-A).

On May 25, 1937, Triangle wrote Austin in part:

• • • it is the general feeling today that once the bars are let down, even in Chicago, warehouses will return generally.

However, we will look into it, feel out our good friends again, and see what can be done. The only argument we have is that Chicago is a basing point, and the only way the whole thing can be worked out is for all companies, in view of Chicago being a basing point, to have a Chicago factory stock to take care of the Chicago basing point territory. There is one thing certain. I cannot get an edge for you in this matter, that is, if you do it I am sure that others will follow. However, let me look into it again (Com. Ex. 526).

On June 17, 1938, I. A. Bennett of National Electric wrote to W. J. Drury of Graybar Electric, who was then a member of the conduit committee of NEWA, and stated in part:

The Youngstown Sheet and Tube Company and Triangle Conduit and Cable Company, both have local stocks of Rigid Conduit in the Chicago District.

This is the beginning of the opening of manufacturers' warehouse stocks, which have been eliminated everywhere except on the Pacific Coast. • • • (Com. Ex. 603).

In September 1938 the rumored reinstitution of warehouse stocks was being investigated by RSCA. The minutes of an association meeting at that time show:

Mr. R. M. Garland stated that he had reports that warehouses were being established in various parts of the country, whereupon, Mr. Booth stated that he was investigating several reports which had come to him in this connection, but that his investigation was not complete at the present time (Com. Ex. 34-Z2).

The conduit committee of NEWA, reporting on its October 18, 1938, meeting, attended by representatives of
American Circular Loom Company, Inc., Austin, Cen-
437 tral Tube, Enameled Metals, Fretz-Moon, General Electric, National Electric, Steel and Tubes, Inc., Steelduct, Walker Brothers, and Youngstown, said in part:

Much to the dismay of your Committee, information was presented to the effect that there is the possibility of a

BLEED THROUGH – POOR COPY

trend toward the re-establishment of manufacturers' local warehouse stocks in the key cities of the country. In at least one case this has become an accomplished fact. It was the very definite expression of manufacturers present at our meeting that the establishment of such local stocks was highly undesirable from an economic point of view. However, it was pointed out in no uncertain terms that if one or two manufacturers determined on such a policy it is quite obvious that others must in due course follow suit. It is the most apparent issue in this report that the wholesaler urge upon his respective suppliers a continuation of the policy of not establishing local warehouse stocks as being economically unsound, tending to duplicate stocks, and an unnecessary expense and waste (Com. Ex. 39-E).

The reports of the meetings of the conduit committee of May 22, 1939, and October 17, 1939, contain statements similar to that appearing in the report of May 20, 1940, which reads in part:

The manufacturers continue to express entire satisfaction with the economies resulting from the discontinuance of their local warehouse expense, and reiterate their liking for wholesaler warehousing as now in operation, thereby eliminating the unnecessary waste of additional expense involved in local warehouse stocks (Com. Ex. 42).

Paragraph Fifteen: (a) Through the use of the basing-point, delivered-price formula, supplemented by the use of common delivery charge factors and common freight rate books to aid in reducing and eliminating price differences which might arise through the individual calculation of freight rates and the conversion of such rates from terms of cents per hundred pounds to cents per hundred feet of conduit of any given size, respondent conduit sellers have been able to achieve a substantial degree of delivered price identity in quoting and selling conduit. The effectiveness of respondents' formula is illustrated in the record in several ways. The following examples taken from 438 public bids show varying degrees of uniformity.

Bids to The Panama Canal for supplying 111,000 feet of conduit f. o. b. Cristobal or Balboa, Canal Zone, were opened June 17, 1935, and were as follows:

American Elec. Supply Company	$8188.90	5% 10 days
M. B. Austin Company	8188.90	5% 10th proximo
Baitenger Electric Co., Inc.	8188.90	5% 15th proximo
Philip Cass Co.	8188.90	5% 10th proximo

Central Tube Company	8188.90	5%	10th proximo
Clayton Mark & Co.	8188.90	5%	10th proximo
Enamel Metals Company	8188.90	5%	10th proximo
Gaffney Kroese Electric Supply Co.	8188.90	5%	10th proximo
Garland Manufacturing Company	8188.90	5%	10th proximo
Gertler Electric Supply Corp.	8188.90	5%	10th proximo
Graybar Electric Company	8188.90	5%	10th proximo
Greene Wolfe Co., Inc.	8188.90	5%	15th proximo
Home Lighting Co., Inc.	8188.90	5%	10th proximo
Hudson Electric Supply Company	8188.90	5%	10th proximo
Laclede Tube Company	8147.70	5%	10 days
Lavenson & Savasta	8188.90	5%	10th proximo
Lee Electric So.	8188.90		10th proximo
Loman Electric Supply Co.	8188.90		10 days
National Electric Products Corp.	8188.90	5%	10th proximo
Noland Company, Inc.	8188.90	5%	15th proximo
Shell Electric Supply Corp.	8188.90	5%	10 days
Thomas Summerville Co.	8188.90	5%	10th proximo
Steel and Tubes, Inc.	8188.90	5%	10 days
Steelduct Company	8188.90	5%	10th proximo after shipment
Triangle Conduit & Cable Co., Inc.	8188.90	5%	10th proximo
U. S. Electric Export Corp.	8188.90	5%	10th proximo
Walker Bros.	8188.90	5%	10th proximo
Weinstein Supply Company	8188.90	5%	10 days
West Philadelphia Electric Supply Co.	8188.90	5%	10th proximo
Westinghouse Electric Supply Co.	8188.90	5%	10th proximo
Youngstown Sheet & Tube Co.	8188.90	5%	10th proximo
Baltimore Electric Supply Co.	8188.90	5%	10th proximo
National Electric Supply Co.	8188.90	5%	15th proximo

(Com, Ex. 318).

In the above instance, 12 respondent conduit sellers submitted bids. Austin, Central Tube, Clayton Mark, Enameled Metals, Garland, National Electric, Steel & Tubes, Inc., Steelduct, Triangle, Walker Brothers, and Youngstown each bid $8,188.90, and Laclede Tube bid $8,147.70, but under a policy of disregarding bids which did not comply with the invitation, the award in this instance was made by lot.

BLEED THROUGH – POOR COPY

439 Bids on 100,000 feet of conduit for The Panama Canal opened January 6, 1938, were as follows:

American Electric Supply Co.	$6200.00	5%—10th proximo
M. B. Austin Company	6200.00	5%—10th proximo
Baitinger Electric Company, Inc.	6200.00	5%—10th proximo
Enameled Metals Company	6200.00	5%—10th proximo
Gaffney Kroese Electric Company	6200.00	5%—15th proximo
Garland Manufacturing Company	6200.00	5%—30 days
Germantown Electric Supply Co.	6200.00	5%—15th proximo
Gertler Electric Supply Corp.	6200.00	5%—20 days
Gold Seal Electric Supply Co.	6200.00	5%
Graybar Electric Company, Inc.	6200.00	5%—10th proximo
Greene Wolf Company, Inc.	6200.00	2%—10 days
Laclede Steel Company	6200.00	5%—10th proximo
E. B. Latham & Company	6200.00	5%—10th proximo
Leman Electric Supply Company		
Louis Electric Corporation	6200.00	2%—10th proximo
Clayton Mark Company	7000.00	2%—10 days
National Electric Products Corporation	6200.00	5%—10th proximo
Noland Company, Inc.	6200.00	5%—10th proximo
Shell Electrical Supply Corp.	6200.00	5%—10th proximo
Steelduct Company	6200.00	5%—10 days
Steel & Tubes, Inc.	6200.00	5%—10th proximo
U. S. Electrical Export Corp.	6360.00	5%—30 days
Walker Brothers	6200.00	5%—10th proximo
S. Weinstein Supply Co.	6200.00	5%—10th proximo
West Philadelphia Electric Supply Co.	5823.95	2%—10 days
Westinghouse Electric Supply Co.	6200.00	5%—10 days
Youngstown Sheet & Tube Company	6200.00	5%—10th proximo

General Electric Supply Corp.	6200.00	5%—10th proximo
Nathan Goodman Company, Inc.	6200.00	5%—10th proximo
(Com. Ex. 324).	6200.00	5%—10th proximo

In the instance above, 10 of respondent conduit sellers submitted bids. Austin, Enameled Metals, Garland, Laclede Steel, Clayton Mark, National Electric, Steelduct, Walker Brothers, and Youngstown each bid $6,200, and Steel and Tubes, Inc., bid $6,360.

Bids on 2,000 feet of conduit for The Panama Canal opened December 21, 1938, were as follows:

Graybar Electric Co., Inc.	$687.00	5%—10th prox.
The Greene-Wolf Co., Inc.	687.00	5%—10 days
Clayton Mark & Co.	687.00	5%—10th prox.
Monumental Electrical Supply Co.	638.00	5%—20 days
Steel & Tubes, Inc.	685.80	5%—10 days
440 Walker Bros.	687.00	5%—10th prox.
Williamsburg Electric Supl. Cor.	666.40	5%—10 days
General Electric Supply Corp.	686.60	5%—10th prox.
National Electric Products Corp.	687.00	5%—10th prox.
E. B. Latham & Co.	686.60	5%—30 days
Garland Mfg. Co.	687.00	5%—30 days
Gertler Elec. Supply Corp.	666.80	5%—10 days
Associated Hardware & Supplies Corp.	656.00	5%—20 days
Youngstown Sheet & Tube Co.	687.00	5%—10th prox.
Electrical Industrial Equipment & Supply Corp.	640.00	5%—10 days
American Electric Supply Co.	687.00	5%—10 days

(Resp. Ex. 12).

It will be noted that 6 of respondent conduit sellers bid in the above instance. Clayton Mark, Walker Brothers, National Electric, Garland, and Youngstown each bid $687, and Steel and Tubes, Inc., bid $685.80.

(b) The effect of this pricing system in securing and maintaining identity of delivered-price quotations and prices in private sales was substantial. RSCA tabulated the percentage of all sales of conduit which were "on

BLEED THROUGH – POOR COPY

card"; that is, which accurately reflected the controlling base prices. In a memorandum circulated by Mr. Booth under date of February 10, 1938, it is stated:

The percentage of tonnage shipped in the month of December on Card 76 by the Industry was 81.46%.

This includes all the thirteen members in the Industry, and compares with 80.86% in the month of November 1937 (Com. Ex. 496).

The report of the conduit committee of NEWA of its meeting of May 23, 1938, states in part:

You will probably be interested in knowing the manufacturer's report that in the month of March, 1938, 87½% of the rigid iron conduit sold at card 76 (Com. Ex. 39-D).

Respondent conduit sellers placed evidence in the record indicating the percentage of adherence to card price by individual respondents for particular periods of time. The exact degree of adherence is immaterial, however, since it is clear from the entire record that the percentage of adherence was substantial and at times almost complete. The record also tends to show that departures from card prices were often largely confined to particular and limited areas and did not represent a condition general throughout the country.

441 (c) In addition to the statistical showing of the results of respondents' plans and activities, appraisals of results expressed in general terms appear in the record. Among these is a letter of December 23, 1938, from respondent Herbert S. Blake to I. A. Bennett summarizing the successes and failures of RSCA under his management and outlining a future course intended to correct the failures and "strengthen the basic value that the Association should be and can be made to be to the industry * * *." He stated in part:

Major Quinn stated that you desired me to summarize my views as to the status of matters in the rigid steel conduit industry and outline what should be done to deal with the situation more effectively. This is rather a large order to fill by letter, especially as there are many "inside" things that should be said which are not desirable in a letter.

* * * * *

When the Association was reorganized, two years ago, consultation with the important factors in the industry resulted in the establishment of a method of merchandising

which at that time was deemed necessary in order to correct the ills of the Industry. This plan was based on the view that it was absolutely necessary to control the "secondary" market and the probability of the success of the plan was founded upon the belief that the Distributors of conduit would support the plan whole-heartedly, * * *.

There is no question but what the plan, throughout the period, which followed a most chaotic market condition, did, for some months promote a far greater degree of stability in the industry than had existed for a long time previous, and resulted in earnings which would not otherwise have been achieved. * * *

Mr. Blake then stated that the program failed of continued success because distributors did not give it unqualified support and producers did not maintain their published prices, and said both of these conditions were due to a drop in the aggregate volume of sales because of general business conditions and the incursion of substitute products. He continued:

* * * The force which undermines even an approach to stability in the secondary market is weakness in the
442 primary market and the only manner in which a firm secondary market can be developed is on the basis of certainty on the part of Distributors that the primary market is stable (Com. Ex. 576-A and B).

In writing Mr. Blake after his resignation, Fretz-Moon stated in part:

It requires only casual observation of what has happened to us since we have lost your leadership to realize the benefits sacrificed by our foolish action in allowing you to withdraw. It is costing us today at least $5.00 per ton for not following your advice and at this rate the total cost runs into very substantial figures (Com. Ex. 621).

Paragraph Sixteen: (a) In addition to the matters heretofore set out, there are certain facts of a general nature which relate to and are explanatory of the basing-point, delivered-price system used in quoting and selling conduit and of the results flowing from its use. Respondent conduit sellers produce all the conduit manufactured in this country. Conduit is produced by Cohoes at Cohoes, New York; by Enameled Metals at Etna, near Pittsburgh, Pennsylvania; by Fretz-Moon at East Butler, Pennsylvania; by Garland at West Pittsburgh, Pennsylvania; by General Electric at New Kensington, Pennsylvania; by

BLEED THROUGH – POOR COPY

Laclede Steel at Alton, Illinois, near St. Louis, Missouri; by National Electric at Ambridge, near Pittsburgh, Pennsylvania; by Spang Chalfant at Etna, Pennsylvania; by Triangle at Moundsville, West Virginia; by Walker Brothers at Conshohocken, near Philadelphia, Pennsylvania; and by Youngstown at Struthers, Ohio, and Indiana Harbor, Indiana. The Indiana Harbor plant of Youngstown produces only the large sizes of conduit and not a full line. Clayton Mark, Steelduct, Austin, and Clifton do not manufacture conduit, but sell and distribute conduit manufactured for them and under their own brands by one or more of the producers named above, and Republic, through its Steel and Tubes Division, distributes Fretz-Moon conduit. Seven of the twelve plants producing conduit are located within the switching limits of Pittsburgh, from which freight rates to other areas are the same although they may differ within the local area.

(b) The Chicago base price of conduit has been consistently maintained at a figure approximately $4 per ton above the Pittsburgh base price. The area controlled by the Chicago base; that is, the area in which the sum of the Chicago base price plus delivery charge factors is less than the sum of the Pittsburgh base price plus delivery charge factors, is relatively quite small. It controls destination price 443 quotations in Wisconsin, parts of Minnesota, Iowa, Missouri, Illinois, and Indiana, and certain small isolated areas in Wyoming, Colorado, Nevada, New Mexico, and Texas. Prices at all other destinations in the United States are controlled by the Pittsburgh base.

(c) Respondent conduit sellers have consistently published identical price quotations, and such quotations were upon a basing-point, delivered-price basis. With respect to the refusal of conduit sellers to quote true f.o.b. mill prices, occasional exceptions have occurred in the bids made to agencies of the Federal Government when land-grant freight rates were available to such agencies. Some of these exceptions, however, were more apparent than real, in that purported f.o.b. prices were in fact related to base prices or a method of freight equalization was used to eliminate differences resulting from the application of land-grant rates. Also, a conduit seller whose plant is located at a basing point can make sales to purchasers at locations where the price is controlled by such basing point upon an

f.o.b. basis without necessarily infringing the basing-point price pattern.

(d) The price of conduit has shown a high degree of rigidity. For example, cards 72 and 82 were each in effect for at least 8 months, card 80 for about 10 months, card 69 for about 12 months, and card 70 for about 18 months. The failure of prices to respond to changing conditions of supply and demand, both locally and nationally, indicates the absence of effective competition. Some of the respondents have contended that the demand for conduit is not affected by price but is dependent upon the total volume of construction work, in which the cost of conduit is but a small factor. In some uses conduit must be installed regardless of price. In many uses, however, some of the products which compete with conduit may be installed in lieu of conduit when the price relationship and relative advantages and disadvantages warrant. A correlation of price changes with total sales of conduit, expressed in terms of percentage of industry capacity to produce, indicates not only that the volume of conduit sales responds to price changes, but also that the price of conduit has been rigid for long periods in the face of rapidly decreasing demand. At the time card 76 was issued in March 1937, increasing the price of conduit approximately 25 percent, total sales approximated 70 percent of the industry capacity to produce. Following this price increase, sales decreased rapidly and amounted to less than 25 percent of industry capacity in July 1938. In that month cards 77 and 78 were issued, the last of which reduced the price to the approximate level existing before card 76 was issued, and in November 1938 card 79 made a further reduction, which was canceled by card 80, is-
444 sued in December 1938. Beginning with the first price reduction in July 1938, sales slowly and somewhat irregularly increased to about 50 percent of plant capacity in October 1938, when there was a price increase by the issuance of card 81, and this increase was followed by a sharp decline in sales to about 25 percent of plant capacity in February 1940. A price reduction was made by card 82 in February 1940, and this was quickly followed by an increase in sales which reached about 60 percent of industry capacity before the end of 1940.

(e) Not all of the respondent conduit sellers distribute conduit on a national scale. The number and, in part, the identity of the conduit sellers whose products are available

BLEED THROUGH – POOR COPY

in any given section of the country vary as between different sections. Similarly, not all conduit sellers have sales representation at all locations where conduit is sold and the number and, in part, the identity of the conduit sellers whose products are available at any given location vary as between locations. The conduit sellers who actually distribute their products in sections and at locations where other conduit sellers do not seek to make sales are able to, and do, there maintain the basing-point, delivered-price formula as fully and as successfully as if all conduit sellers participated. In occasional instances in particular localities or to particular purchasers one or more conduit sellers, through intent or error, quote or sell conduit at prices which are not in accord with the basing-point delivered prices concurrently offered in the same localities or to the same purchasers by other conduit sellers. In such situations, when two or more but not all conduit sellers adhere to the formula prices, the effects produced by such adherence are similar in character but less in degree than those resulting when all conduit sellers adhere to the formula prices.

Paragraph Seventeen: (a) The use by respondent conduit sellers of the pricing formula heretofore described requires each such seller to discriminate among purchasers of conduit by charging some more than others for similar goods, not merely in the sense that the delivered cost to one purchaser is higher than to another by the amount of the difference in actual delivery costs, but through deliberately varying the seller's mill nets in order to quote prices identical with those of competitors at the same destinations according to the pattern established by the formula.

(b) A conduit seller whose mill is not located at a basing point charges fictitious delivery costs to purchasers located in his home town and at all other points where he has
445 a freight advantage as compared with mills located at the controlling basing point, because under the formula generally followed his quotations at all such points amount to the sum of the base price plus the delivery charge factor from the basing point, although in fact the actual delivery cost is less than the delivery charge factor included in the delivered price. On such sales the seller's mill net is higher than the base price by the amount of "phantom freight" charged the purchaser. For example, Laclede Steel quotes

prices in St. Louis which represent the sum of the Pittsburgh base price plus the delivery charge factor from Pittsburgh to St. Louis, although in fact the conduit is produced in and delivered from Alton, Illinois, a few miles from St. Louis. A similar example is Walker Brothers, which has its plant at Conshohocken, Pennsylvania, a few miles from Philadelphia. This company, nevertheless, quotes prices in Philadelphia equivalent to the sum of the Pittsburgh base price plus the delivery charge factor from Pittsburgh. In one large transaction, Walker Brothers quoted a price in Philadelphia which included approximately $25,000 in phantom freight. In each such quotation the seller increases his mill net or real price by the exact amount necessary to produce a quotation equivalent to the sum of the controlling base price plus delivery charge factor from that base to the particular destination.

On the other hand, the conduit seller who is not located at a basing point shrinks his mill net below the controlling base price on sales at destinations where he is at a freight disadvantage as compared with the controlling base. In each such quotation the shrinkage of the mill net, or real price, is the exact amount necessary to produce a quotation equivalent to the sum of the controlling base price plus the delivery charge factor from that base to the particular destination.

(c) In the case of a seller whose plant is located at a basing point, his quotations at all destinations controlled by that base are the sum of the base price plus delivery charge factor from that base to the particular destination. However, when such a seller quotes at destinations controlled by another base, he shrinks his mill net or real price by the exact amount necessary to produce at any such destination a quotation equal to the sum of the controlling base price plus delivery charge factor from that base.

(d) In effect, this pricing pattern amounts to each seller inviting other sellers to share in the available business in his freight-advantage territory in return for the privilege of sharing in the available business in the freight-advantage territory of other sellers. It thus promotes the cross-
446 shipping of conduit with the attendant costs, without tending to increase the total consumption of conduit. It requires the maintenance of a higher price level than would otherwise be necessary, in order that each seller may secure an additional margin on some sales to counterbal-

BLEED THROUGH – POOR COPY

ance the lower mill nets recovered on other sales, or, in other words, to permit sellers to distribute conduit, a heavy commodity upon which freight charges are substantial, upon a national scale. By denying to some purchasers the advantages of their location with respect to points at which conduit is produced, sellers are enabled to subsidize their own sales to other purchasers who are not so favorably located.

(e) Under the conditions which have existed in the industry sellers used the basing-point, delivered-price system in the sale and distribution of conduit. Aside from the conditions which have existed, it is inevitable that the use of such system by any conduit seller in quoting prices on conduit would come to the knowledge of the other conduit sellers through ordinary trade channels. As a practical matter, it would be impossible for one conduit seller to quote prices in accordance with the basing-point, delivered-price system and conceal that fact from the other conduit sellers.

Paragraph Eighteen: (a) In addition to knowledge of the use of the basing-point, delivered-price formula by others, each conduit seller knows that by its use each will be able to quote a price at any given destination identical with the prices quoted by others pursuant to such formula, and thus all users of the formula will be enabled to present to a prospective purchaser a condition of matched prices in which such purchaser is isolated and deprived of any choice on the basis of price. Respondent conduit sellers assert that in matching price quotations with other sellers at any given destination they are "meeting competition." In order to produce such matched prices sellers must, at numerous destinations, increase their mill nets or real prices and at numerous destinations concurrently reduce their mill nets. Such systematic price variations according to the pattern described do not represent competition in the ordinary meaning of that term. Each participant in the use of this pricing formula consciously intends that no attempt be made to exclude any seller from the natural freight-advantage territory of another and by the use of the formula in effect invites others to share the available business in his natural market in return for a reciprocal invitation.

(b) Respondents' basing-point delivered-price formula is a pricing system recognized by economists as a con-
447 trolled price or monopolistic price system and does not in its operation or results conform to the recognized

economic principles which indicate the existence of free or effective competition. One of the characteristics of effective competition is that prices readily respond to changing conditions of supply and demand whereas respondents' system has produced a high degree of price rigidity and at times prices have even moved contrary to what would be expected in a market amenable to the law of supply and demand. The use of the pricing formula produces a condition of mutual dumping inconsistent with the existence of effective competition. The systematic pattern of discriminations among purchasers of conduit would not exist concurrently with effective competition and the use of a formula which produces a condition of matched delivered-price quotations indicates the absence of effective competition.

(c) The economic principle that in a truly competitive market the unit price of a homogenous commodity tends to become approximately uniform does not serve to explain the results of the use of respondents' pricing formula. The tendency toward price uniformity in a free market results from the fact that in the purchase and sale of units of a homogenous commodity in such market sellers are indifferent as to whose money they get for their commodity and buyers are indifferent as to whose commodity they get for their money. The systematic differences in mill nets accepted by respondent conduit sellers violate the principle of indifference. It is also true that the law of uniform price is limited in its application to prices which eventuate from actual sales and has no application to and cannot explain uniformity of price quotations.

Paragraph Nineteen: (a) Pursuant to Count I of the complaint herein the Commission concludes from the evidence of record and therefore finds that the capacity tendency and effect of the combination and conspiracy maintained by the respondents named therein in the manner aforesaid, and the acts and practices performed thereunder and in connection therewith by said respondents as set out herein, has been, and is, to hinder, lessen, restrain, and suppress competition in the sale and distribution of conduit in, among, and between the several States of the United States; to deprive purchasers of conduit of the benefits of competition in price; to maintain artificial and monopolistic methods and prices in the sale and distribution of conduit; to prepare and maintain common rate factors and common delivery charge factors or "freight adders" used and useful in determining and establishing

BLEED THROUGH – POOR COPY

price quotations and prices for conduit; to classify purchasers of conduit and determine the treatment to be accorded them; to establish and maintain uniform discounts, terms, and conditions of sale; to determine and con-
448 trol the use of warehouses in the distribution of conduit; to prepare, adopt, and use for the purpose of aiding in price maintenance and control, uniform contracts for distributors and for contractors buying for specific projects, and to enforce the terms of such contracts through investigations and reports thereon; to support and maintain their price structure through the conduct of investigations of sales and offers to sell, and the circulation of reports thereon; and otherwise to maintain and promote the purposes of their combination and conspiracy to hinder, lessen, and restrain competition in the sale and distribution of conduit.

(b) Pursuant to Count II of the complaint herein, the Commission concludes from the evidence of record, and therefore finds, that the capacity, tendency, and effect of the use by each respondent named therein of the basing-point, delivered-price formula to determine price quotations and prices which will be made to conduit purchasers at any given destination concurrently with similar use of the same pricing formula by other of the said respondents has been, and is, to hinder, lessen, and restrain competition in price in the sale and distribution of conduit; to deprive purchasers of the benefits of competition in price; to unfairly discriminate among purchasers; and to create in each of said respondents a dangerous tendency toward a monopolistic control over price in the sale and distribution of conduit.

Conclusion.

The aforesaid acts and practices of respondents constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

By the Commission.

R. E. Freer,
Chairman.

(Seal)

Dated this 6th day of June, A. D. 1944.

Attest:
Otis B. Johnson,
Secretary.

449 UNITED STATES OF AMERICA.

BEFORE FEDERAL TRADE COMMISSION.

At a regular session of the Federal Trade Commission, held at its office in the City of Washington, D. C., on the 6th day of June, A. D. 1944.

Commissioners:

Robert E. Freer, Chairman,
Garland S. Ferguson,
Charles H. March,
Ewin L. Davis,
William A. Ayres.

* * (Caption—4452) * *

ORDER TO CEASE AND DESIST.

451 This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answers of respondents, testimony and other evidence in support of and in opposition to the allegations of said complaint taken before an examiner of the Commission theretofore duly designated by it, report of the trial examiner and exceptions thereto, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act:

It Is Ordered that respondent Rigid Steel Conduit Association, an unincorporated voluntary association, its officers, directors, representatives, agents, and employees, the corporate respondents Clayton Mark & Company, Cohoes Rolling Mill Company, Enameled Metals Company, Fretz-Moon Tube Company, Inc., General Electric Company, Laclede Steel Company, National Electric Products Corporation, Steelduct Company, Triangle Conduit & Cable Company, Inc., Walker Brothers, Youngstown Sheet and Tube Company, Republic Steel Corporation, M. B. Austin Company, their respective officers, representatives, agents, and employees, in or in connection with the offering for

BLEED THROUGH – POOR COPY

sale, sale, and distribution of rigid steel conduit in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Quoting or selling rigid steel conduit at prices calculated or determined pursuant to or in accordance with the basing-point, delivered-price system; or quoting
452 or selling rigid steel conduit at prices calculated or determined pursuant to or in accordance with any other plan, system, or formula which produces identical price quotations or prices for rigid steel conduit by respondents using such plan, system, or formula at points of quotation or sale, or to particular purchasers, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents as against any of the other respondents.

2. Establishing, fixing, or maintaining prices, terms, or conditions of sale for rigid steel conduit, or adhering to any prices, terms, or conditions of sale so fixed or maintained.

3. Collecting, compiling, circulating, or exchanging information concerning common carrier transportation charges used or to be used as a factor in computing the price of rigid steel conduit; or using, directly or indirectly, any such information so collected, compiled, or received as a factor in computing the price of rigid steel conduit.

4. Collecting, compiling, circulating, or exchanging "freight adders," delivery charge booklets, or other information concerning delivery charges on rigid steel conduit used or to be used as a factor in computing the price of such conduit; or using, directly or indirectly, any such information so collected, compiled, or received as a factor in computing the price of rigid steel conduit.

5. Circulating or exchanging information concerning the classification granted or to be granted to any specific purchaser of rigid steel conduit; or determining upon any basis for the selection or classification of customers, or using any basis so determined for selecting or classifying customers.

6. Determining upon the location, establishments, main-

tenance, or discontinuance of warehouses or other places for the stocking of supplies of rigid steel conduit.

7. Formulating or adopting consigned stock, specific building, or any other forms of contracts or agreements
453 concerning the sale or distribution of rigid steel conduit, or using any contracts or agreements so formulated or adopted, for the purpose or with the effect of aiding or assisting in arriving at or maintaining uniform prices, terms, or conditions in the sale or distribution of such conduit.

8. Directly or indirectly investigating or checking the prices, quantities, terms, or conditions of any sale or offer to sell rigid steel conduit to any buyer or prospective buyer for the purpose or with the effect of aiding or assisting in maintaining uniform prices, terms, or conditions in the sale of such conduit.

9. Doing or causing any of the things forbidden in the preceding paragraphs of this order to be done through respondents Charles Donley, Herbert S. Blake, Organization Service Corporation, or any other individual, corporation, or organization.

It Is Further Ordered that respondent Charles Donley, an individual, his representatives, agents, and employees, do forthwith cease and desist from knowingly advising, assisting, or cooperating with the aforesaid respondents, or any of them, in doing any of the things forbidden by paragraph numbered 3 above.

It Is Further Ordered that respondent Herbert S. Blake, an individual, his representatives, agents, and employees, and respondent Organization Service Corporation, a corporation, its officers, representatives, agents, and employees, do forthwith cease and desist from advising, aiding, assisting, or directing the aforesaid respondents in any manner in doing any of the things forbidden by paragraphs numbered 1 to 8, inclusive, of this order.

It Is Further Ordered that respondent The National Electrical Wholesalers Association, an unincorporated association, its officers and members, the officers and members of its conduit committee, and respondents General Electric Supply Corporation, a corporation, E. B. Latham & Company, a corporation, Graybar Electric Company, Inc., a corporation, Revere Electric Supply Company, a corporation, Kiefer Electrical Supply Company, a corporation, Westinghouse Electric Supply Company, a corporation, Fife Electric Supply Company, Columbian Electrical Com-

BLEED THROUGH – POOR COPY

pany, W. T. McCullough Electric Company, Peerless Electric Supply Company, The Hardware and Supply Company, F. D. Lawrence Electric Company, and The C. S.
454 Mersick and Company, individually and as such members, their respective officers, representatives, agents, and employees, do forthwith cease and desist from aiding, assisting, or cooperating in any manner with the respondents subject to the provisions of paragraphs numbered 1 to 8, inclusive, of this order, or any of them, in doing any of the things forbidden in said paragraphs.

It Is Further Ordered that each of the corporate respondents Clayton Mark & Company, Cohoes Rolling Mill Company, Enameled Metals Company, Fretz-Moon Tube Company, Inc., General Electric Company, Laclede Steel Company, National Electric Products Corporation, Steelduct Company, Triangle Conduit & Cable Company, Inc., Walker Brothers, Youngstown Sheet and Tube Company, Spang Chalfant, Inc., Republic Steel Company, and M. B. Austin Company, their respective officers, representatives, agents, and employees, and respondents George L. Hatheway, Regina G. Hatheway, Katherine R. Hatheway, and Jane Hatheway, copartners trading as Clifton Conduit Company, their representatives, agents, and employees, in or in connection with the offering for sale, sale, and distribution of rigid steel conduit in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from doing any of the following things for the purpose or with the effect of systematically matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill nets received on sales to different purchasers:

(a) Quoting or selling rigid steel conduit at prices calculated or determined pursuant to, or in accordance with, the basing-point, delivered-price system.

(b) Quoting or selling rigid steel conduit at delivered prices calculated as, or systematically equivalent to, the sum of the price in effect at, plus a transportation charge factor from, any point other than the actual shipping point.

(c) Quoting or selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination.

(d) Discriminating among purchasers by quoting or

selling rigid steel conduit at prices which systematically differ in terms of mill nets according to the location of
455 purchasers, and which mill nets, plus common carrier transportation charges to the respective locations of such purchasers, produce delivered costs identical with those to such purchasers from differently located respondents.

It Is Further Ordered that, for reasons appearing in the findings as to the facts, the complaint herein be, and the same hereby is, dismissed as to Central Tube Company, Garland Manufacturing Company, Laclede Tube Company (Missouri), Steel and Tubes, Inc., and F. C. Hodkinson; that Count I of the complaint be, and the same hereby is, dismissed as to respondents George L. Hatheway, Regina G. Hatheway, Katherine R. Hatheway, and Jane Hatheway, copartners trading as Clifton Conduit Company, and respondent Spang Chalfant, Inc.; and that Count II of the complaint be, and the same hereby is, dismissed as to respondent General Electric Supply Corporation.

It Is Further Ordered that the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

Otis B. Johnson,
(Seal) *Secretary.*

303 UNITED STATES OF AMERICA,

Before Federal Trade Commission.

* * (Caption—4452) * *

EXCEPTIONS TO THE TRIAL EXAMINER'S REPORT BY COUNSEL FOR THE COMMISSION.

Now comes counsel for the Federal Trade Commission and takes exception to the Trial Examiner's report on the evidence as hereinafter stated. Most of the exceptions taken and the more important ones go to the Examiner's failure or omission to report certain evidence considered by counsel for the Commission as needful for a more complete understanding of the facts. The exceptions to particular paragraphs of the report are presented seriatim.

BLEED THROUGH – POOR COPY

In some cases no citations are necessary other than those given by the Examiner.

Exception No. 1. Exception is taken to the failure to report in Paragraph 2 that the record shows the Rigid Steel Conduit Association was not dissolved or discontinued until after considerable investigation of its activities had been made by representatives of the Federal Trade Commission (Tr. 1614-1615; see also Com. Exs. 38-42).

Exception No. 2. Exception is taken to the failure to report in Paragraph 35 that the evidence in the record shows that the National Electrical Wholesalers Association in pursuing its stated purposes engaged in little if any patriotic activities, and instead dealt principally in meetings, exchanging views, taking action upon and cooperating in collective handling of marketing and pricing problems in the sale of rigid steel conduit (Com. Exs. 38-42; Com. Ex. 531-A-B, but see Tr. p. 2543; see also Com. Ex. 530 to which this is a reply).

Exception No. 3. Exception is taken to the report in Paragraph 36 to the effect that seven rigid steel conduit manufacturers have plants located "at or near" Pittsburgh, Pennsylvania, and the failure in that connection to show definitely and clearly that the word "near" as used therein, applies to those of the said seven manufacturers whose plants are located as far from Pittsburgh, Pennsylvania, as Struthers, Ohio (in the vicinity of Cleveland-Youngstown), Butler, Pennsylvania, New Kensington, 304 Pennsylvania, and Moundsville, West Virginia, from which locations to a number of important centers where rigid steel conduit is used, certain well defined differences in costs of transportation apply. Freight from such manufacturing points to certain locations such as Cleveland, Ohio, is substantially different than from Pittsburgh, Pennsylvania (Resp. Ex. 30; Com. Ex. 749-760; Tr. pp. 861 *et seq.*, 871 *et seq.*, 922-924, 925-927, 1485-1488, 1493-1495; Com. Exs. 53-70 and 71-89).

Exception No. 4. Exception is taken to the failure to report in Paragraph 32 that respondent Frank C. Hodkinson was selected by representatives of a number of the respondent "conduit sellers" to represent the rigid steel conduit manufacturing industry and to supervise for them the administration of their code of competition in 1933 (Com. Ex. 692Z286; Resp. Exs. 258-263), which they promulgated and agreed upon (Com. Exs. 162-163 and

692Z292) and that respondent Frank C. Hodkinson then proceeded to advise, manage and direct the handling of competitive problems between and among respondent rigid steel conduit manufacturers and a number of wholesalers of rigid steel conduit concerning the presentation by them of a common and united front in quoting prices on rigid steel conduit and in the submission of bids under seal to the Federal Government (Com. Exs. 91-95, 114, 144, 154-155, 157-187, 189-243, 266-293, 296-303, 333 and 416).

Exception No. 5. Exception is taken to the failure to report in Paragraph 39 that respondent Donley was assisted by and received cooperation of the members of the transportation committee of respondent Rigid Steel Conduit Association in the preparation of the "freight rate books" referred to in said paragraph 39 (Com. Exs. 377-386 and 401-408, and Tr. pp. 1269 *et seq.*).

Exception No. 6. Exception is taken to the report in paragraph 47 as originally stated in next to the last sentence thereof, and as amended through correction of such sentence September 2, 1942, in so far as it may permit inferences to be drawn therefrom that the evidence of the action taken by respondents to enforce the agreements is limited to the showing of recommendations of the National Electrical Wholesalers Association to the Rigid Steel Conduit Association.

Exception No. 7. Exception is taken to the failure to report in Paragraph 49 that respondents opposed the maintenance of stocks of rigid steel conduit in warehouses owned and operated by manufacturers in the large cities where conduit is used because they regarded that the maintenance of stocks in such warehouses was unfair to other manufacturers and to the wholesalers (Tr. pp. 4263-4264) and that such alleged unfairness was in turn based upon the fact that other manufacturers and the whole-
305 salers would be forced to compete in price with the manufacturers who made sales out of local warehouse stocks at less cost than when such stocks were not carried (Tr. pp. 4304 and 4375).

Exception No. 8. Exception is taken to the reference in Paragraph 56 to L. A. Woolley, Inc., and McCarthy Bros. & Ford "being wholesalers and members of N.E.M.A." The fact is they are, and have been for a period of several years, members of National Electrical Wholesalers Association or "N.E.W.A."

Exception No. 9. Exception is taken to the failure to

BLEED THROUGH – POOR COPY

report in Paragraph 63 that to the extent plant capacity of respondent conduit sellers exceeds local demand, if any, they reciprocally waive to their competitors so called the freight advantages they respectively enjoy and permit their competitors so called to take up or supply a part of such local demand by shipping in from distant points of manufacture while at the same time reciprocally cross shipping to or near such distant points of manufacture (Com. Exs. 53-70, 71-89, 741-748; Tr. pp. 861 *et seq.*, 871 *et seq.*, 893, 895, 922 *et seq.*, 1485-1488, 1493-1495 and 1545).

Exception is also taken for the failure to report in Paragraph 63 the extent to which, on cross-examination, expert economists who were called by the respondents, conditioned and qualified the testimony they had given on direct examination (Tr. pp. 5725, 5755, 5124, 5098 *et seq.*, 5091, 5037, and answer top of p. 5038, 5077 and 5069).

Exception No. 10. Exception is taken to the failure to report that representatives of respondent rigid steel conduit manufacturers, during the course of meetings and in correspondence with representatives of respondent Rigid Steel Conduit Association, and otherwise discussed and concertedly considered the use of their basing point system of delivered prices, quotations and the names of locations to be used by them as basing points (Com. Exs. 3-A, 3-B, 11-F—first paragraph, 425, 427, 448-451).

Exception No. 11. Exception is taken to the failure to report that respondents have considered and treated as "correct" or "proper" price quotations of theirs and their competitors only when made in accordance with the basing point system of the respondents (Com. Exs. 50-52, 91-95, 99, 133-136, 137, 138, 139, 140, 157, 194-195, 241, 416-422, 429, 489, 490-C, 490-F, 496, 541, 546, 568-A-B; Tr. pp. 1487-1488, 1493-1495, 1876, 1880-1881).

Exception No. 12. Exception is taken to the failure to report that representatives of respondents during the course of one of their meetings expressly agreed upon the use of particular cash discounts (Com. Ex. 691-G).

306 Exception No. 13. Exception is taken to the failure to expressly report that representatives of the respondents concertedly established and used provisions for acceptance of orders on a protective basis of one or more cars for a period of 15 days from date of price advance (Com. Exs. 39-B, 162-163, and Resp. Ex. 159).

Exception No. 14. Exception is taken to the failure to report that a number of the more powerful respondent

rigid steel conduit manufacturers have threatened to take and have taken retaliatory pricing action and otherwise persuaded and coerced firms and individuals engaged in the sale and distribution of conduit in commerce to conform to the delivered price quotations as announced by such powerful respondent rigid steel conduit manufacturers and to adhere to respondents' cooperative and concerted methods and plans of price quoting (Com. Exs. 416, 426, 522, 523, 524, 555, and 556; Tr. pp. 997, 1001, 1322, lines 1-19 *et seq.*, 1324, 1325, 1326, 1477 and 1480).

Exception No. 15. Exception is taken to the failure to report that a great preponderance of all rigid steel manufacturing facilities and productive capacity in the United States is controlled by the respondents General Electric Company, Youngstown Sheet and Tube Company, National Electric Products Corporation, Triangle Conduit and Cable Co., Inc., and Fretz-Moon Tube Company and other affiliates of respondent Republic Steel Corporation (Resp. Ex. 30).

Exception No. 16. Exception is taken to the failure to report that the respondents General Electric Company, Youngstown Sheet and Tube Company, National Electric Products Corporation, Triangle Conduit and Cable Co., Inc., and Republic Steel Corporation and its affiliates are large manufacturers of many and various kinds of supplies and equipment and rigid steel conduit constitutes only a small part of the total volume of their sales of manufactured products in terms of dollars and cents (See Tr. testimony of McAuliffe, pp. 964 *et seq.*, Hawks, pp. 1138 *et seq.*, Holly, pp. 1340 *et seq.*, and 3257 *et seq.*, Newman, pp. 3603 *et seq.*, Bennett, pp. 2574 *et seq.*).

Exception No. 17. Exception is taken to the failure to report that each respondent conduit seller systematically demands, charges, accepts and receives as an incident to its basing point method of delivered price quotations, larger sums and amounts for products of equal quality and quantity from their respective customers located at or near their respective places of business and manufacture than from other customers located at greater distances (see admissions in the answers of respondents who are rigid steel conduit manufacturers. See also Com. Exs. 53-70, 71-88, 89, 741-748, 749-760; Tr. pp. 861 *et seq.*, 871 *et seq.*, 922-924, 1317, 1485-1488, 1493-1495 and 1545).

BLEED THROUGH – POOR COPY

307 Exception No. 18. Exception is taken to the failure to report that to the extent respondents follow the use of the aforesaid basing point practice and system, the full Chicago base prices or the full Pittsburgh base prices, as announced by respondent rigid steel conduit manufacturers and rigid steel conduit wholesalers plus respondents' "freight bulletin" factors and respondents' "delivery charges" factors from Chicago or Pittsburgh, are paid and borne by conduit buyers as a part of the costs of the conduit they buy and use, although the practice of cross-freighting, freight absorption, dumping or cross-hauling as carried on by the respondent sellers of rigid steel conduit affords to the basing point mills, when they ship beyond their natural freight advantage territory and into another base territory and others when they ship in the direction of the basing point mills and to within the natural freight advantage territory of the basing point mills, an average mill net return substantially lower than the level of the Pittsburgh and Chicago base prices. The difference between the full base prices and the average mill net returns thus involved is the equal of the amount of the freight necessary to cover the cost of the practice of cross-hauling, cross-freighting, dumping or, as it is sometimes termed "freight absorption" (Com. Exs. 53-70, 71-89, 741-748, 749-760; Resp. Exs. 30, 120 and 121; Tr. pp. 861 *et seq.*, 871 *et seq.*, 922-924, 925-927, 1485-1488, 1493-1495).

Exception No. 19. Exception is taken to the failure to report that there are certain well-defined differences in the costs of transporting rigid steel conduit from the place of manufacture of one respondent compared with the cost of transporting it from the place of manufacture of another respondent to many important destinations, for which differences due allowances are not made or reflected in the delivered price quotations of the Rigid Steel Conduit Manufacturers (Com. Exs. 749-760, Tr. pp. 861 *et seq.*, 871 *et seq.*, 922-924, 925-927, 1485-1488, 1493-1495; Com. Exs. 53-70, 71-89).

Exception No. 20. Exception is taken to the failure to report that the basing point system of the respondents would not logically or naturally develop and continue under competition (Tr. pp. 6031, 6032, 6037, 6040, 6041, 6043, 6380-6382, 6390 and 6391).

Exception No. 21. Exception is taken to the failure to report with respect to the basing point system of the re-

spondents that the price structure under the system is so artificial that any cut in a price anywhere would result in a breakdown in the entire structure just as a house of cards tumbles down when any supporting card is withdrawn (Tr. pp. 5725, 5755, 6061); that it is not possible for such a system to develop out of the play of impersonal forces in an effective competitive situation (Tr. p. 6400); that the identical delivered price quotations under the system connotes the existence of an agreement or understanding among sellers (Tr. pp. 6049, 6050, 6051); that the absorption of freight under the system means dis-
308 crimination in price (Tr. pp. 6250-6251); that markets are destroyed or dispersed under the basing point system (Tr. pp. 6125, 6126); that it does not lend itself to or involve the use of bargaining processes in buying and selling (Tr. pp. 6028, 6030, 6388); that it does not respond to the operation of supply and demand forces (Tr. pp. 5994, 6358), (in fact, respondents admit, through experts called to testify in their behalf, that the base prices established by respondents do not reflect the individual supply and demand factors operating at each of the destinations where they met delivered price quotations under the basing point system, but instead is the product of all considerations entering into the handling of the pricing problems of the respondents which are thrown into a hopper out of which eventuates the base price—Tr. p. 5124); that the failure of the respondents to also quote f.o.b. mill prices indicates a lack of competition and destruction of free markets (Tr. p. 6053); that varying mill nets which result under the system could never result from competition (Tr. pp. 6052, 6249); that the normal and usual significance of natural or freight advantage territory is done away with under the basing point system (Tr. p. 6520); that an agreement or understanding, either active or passive, is a necessary part of the operation of the system (Tr. p. 6411); that it is a method, a formula, which all manufacturers may take and supply in a technical, arithmetical calculating sense without regard to the operation of the forces of supply and demand (Tr. pp. 6401, 5613); that homogeneous manufactured products are sold and marketed without the use of the basing point system (Tr. pp. 6528-6531); that the system carries with it disadvantages to customers (Tr. p. 6393); that it does not operate to reduce costs to buyers (Tr. p. 6401); that if its use should be forbidden, competition would not only be fostered (Tr. pp. 6396, 6054 and

BLEED THROUGH – POOR COPY

6062) but that the costs of conduit to buyers would be lowered (Tr. p. 6396); that the use of the system is a substantial restriction upon competition in the sale of rigid steel conduit (Tr. p. 5993); that economists almost without exception have agreed that the system is essentially monopolistic in character (Tr. p. 6548); that the mutual dumping involved in the system cancels out any and all possible advantage to anyone, except insofar as it aids respondents in maintaining their aforesaid basing point system. However, such mutual dumping continues to carry with it the burden of cross-hauling (Tr. p. 6428) and the effect of keeping prices up (Tr. pp. 6426-6427).

Exception No. 22. Exception is taken to the failure to report that in a competitive market sellers recognize and operate in accordance with the economic principle of indifference and do not so make sales as to secure higher returns on their sales from their nearby customers 309 than they simultaneously accept from customers located at greater distances while competitors are coming in and taking business from some of the nearby customers (Tr. pp. 1933, 6338-6339).

Exception No. 23. Exception is taken to the failure to report that the law of a uniform price in a market in the economic sense applies to a situation of exchanged or paid prices eventuating out of completed transactions and has no application to bids and offers involved in quotations of prices by sellers looking to future sales (Tr. pp. 1926-1929, 6016 *et seq.*, 6340-6341, 6379).

Exception No. 24. Exception is taken to the failure to report that the major part of the documentary evidence and a very large part of the oral testimony presented in support of the complaint consisted of the records, writings and testimony of respondents themselves.

Exception No. 25. Exception is taken to the failure to report in detail in accordance with contentions of counsel for the Commission as submitted to the Examiner on April 15, 1942, or in detail in accordance with the record evidence cited therein in support of such contentions.

Respectfully submitted,

By Counsel for the Federal Trade Commission.
Everette MacIntyre.

September 30, 1942.

456 In the

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

Triangle Conduit & Cable Co., Inc., and The M. B. Austin Company, *Petitioners,* *against* Federal Trade Commission, *Respondent.*	No. 8639

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed July 27, 1944. Kenneth J. Carrick, Clerk.)

457 To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now come your petitioners, Triangle Conduit & Cable Co., Inc., and The M. B. Austin Company, by their attorney, and jointly and severally present their petition to review and set aside the Order of the Federal Trade Commission (hereinafter referred to as the "Commission") dated June 6, 1944, and respectfully show:

First: That petitioner, Triangle Conduit & Cable Co., Inc., is a corporation duly organized and existing under the laws of the State of Delaware.

Second: That petitioner, The M. B. Austin Company, is a corporation duly organized and existing under the laws of the State of Illinois.

458 I.

A Concise Statement of the Nature of the Proceedings as to which Review is Sought.

Third: That the Commission did heretofore and on or about the 25th day of January. 1941, file and serve its complaint on petitioners alleging in substance in Count I thereof the existence and continuance of a conspiracy to suppress competition in the distribution and sale of rigid

BLEED THROUGH – POOR COPY

steel conduit, pursuant to and in furtherance of which petitioners and their co-respondents named in the said complaint adopted, maintained and used the basing point method in quoting and computing prices for rigid steel conduit and alleging in substance in Count II thereof that the use of the basing point method by petitioners herein and their co-respondents named in the complaint, constitutes an unfair method of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

Fourth: That your petitioner, Triangle Conduit & Cable Co., Inc., on or about the 10th day of April, 1941, duly filed with the Commission, its answer, alleging in substance that it is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and that on or about the 29th day of June, 1940, a statutory merger was effected and completed,
459 whereby Triangle Conduit & Cable Co., Inc., a New York corporation and the respondent named in the complaint, was duly merged into petitioner herein, a Delaware corporation, which said corporation succeeded to and continued in the business theretofore operated and conducted by the New York Corporation. The answer categorically denies the allegations contained in the complaint except for certain factual admissions set forth in detail therein and petitioner demanded in its answer that the complaint of the Commission in said proceeding be dismissed.

Fifth: That your petitioner, The M. B. Austin Company, on or about the 10th day of April, 1941, duly filed with the Commission, its answer, alleging in substance that it sells and distributes rigid steel conduit to and through wholesalers, jobbers and others throughout the United States and which said product has been manufactured for and shipped to it by petitioner, Triangle Conduit & Cable Co., Inc., and denying all of the charges alleged in the complaint and also denying that it was a member of the Rigid Conduit section of National Electrical Manufacturing Association of the Rigid Steel Conduit Association or of any other association or combination of the respondents named in the petition of the Commission and demanding in its answer that the complaint of the Commission in said proceeding be dismissed.

460 Sixth: That on and between the 15th day of

September, 1941, and the 31st day of March, 1942, testimony was taken by the Commission.

Seventh: That thereafter the Trial Examiner of the Federal Trade Commission issued his report in favor of the Commission and against petitioners and certain other co-respondents named in the complaint.

Eighth: That on or about the 24th day of September, 1942, petitioners duly filed their exceptions to the Findings and failure to find of the said Trial Examiner and petitioners did subsequently duly file their briefs.

Ninth: That on or about the 6th day of June, 1944, the Commission issued and served upon petitioners, and on information and belief upon certain of the other co-respondents therein named, its Findings as to the facts and Conclusions and Order to Cease and Desist entered thereon.

II.

The Facts and Statutes upon which Venue is Based.

Tenth: That petitioner, The M. B. Austin Company, maintains its principal place of business in the City of Chicago, County of Cook, State of Illinois, which is within the territorial jurisdiction of this Court.

461 Eleventh: That petitioner, Triangle Conduit & Cable Co., Inc., maintains a warehouse stock in the City of Chicago, County of Cook, State of Illinois, which is within the territorial jurisdiction of this Court.

Twelfth: That the method of competition of which the Commission complains was used by petitioners within the territorial jurisdiction of this Court.

Thirteenth: That petitioners carry on business in this Circuit within the meaning of Section 5 of the Federal Trade Commission Act in that they are regularly engaged in the sale and distribution of rigid steel conduit to purchasers located within the territorial jurisdiction of this Court.

Fourteenth: That the statutes under which this Court has jurisdiction and venue are Section 225, Title 28, U. S. Code (Section 128 of the Judicial Code, as amended), Sec. 45, Title 15, U. S. Code (Sec. 5 of the Federal Trade Commission Act aforesaid) and Section 21, Title 15, U. S. Code (Sec. 11 of the Clayton Act aforesaid). Sec. 225, Title 28, U. S. Code, aforesaid, provides in paragraph (e):

"The Circuit Courts of Appeal are further empowered

BLEED THROUGH – POOR COPY

to enforce, set aside or modify orders of the Federal Trade Commission as provided in Section 45 of Title 15;"

462 Section 45 of Title 15, provides in paragraph (c) in part:

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and the transcript the court shall have jurisdiction of the proceeding and of the question determined therein, * * *"

Section 21 of Title 15, provides in part:

"* * * the commission, authority, or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application or transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission, authority, or board.

* * * * *

"Any party required by such order of the commission, authority, or board to cease and desist from a violation charged may obtain a review of such order in said

463 circuit court of appeals by filing in the court a written petition praying that the order of the commission, authority, or board be set aside. A copy of such petition shall be forthwith served upon the commission, authority, or board, and thereupon the commission, authority, or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided."

III.

The Relief Prayed.

Wherefore, your petitioners pray:

1. That a certified copy of this petition be forthwith served by the Clerk of this Court upon the Federal Trade Commission and that said Commission be required forthwith, in conformity with the statute, to certify and file in this Court a transcript of the entire record in the proceeding aforesaid, including all of the evidence taken and the Findings as to the Facts and Conclusion and the Order to Cease and Desist of the Commission.

2. That the Federal Trade Commission be required, further, to certify and file in this Court the Trial Examiner's Report upon the Evidence and the Exceptions duly filed thereto by and on behalf of petitioners and their co-respondents.

3. That this Court review the record in this pro-
464 ceeding, to the extent designated by petitioners herein (and such other co-respondents as may petition for review of the same Order of the Commission), pursuant to Rule 36, Subdivision 5.(a) of the rules of this Court, the Order to Cease and Desist of the Commission, including its Findings as to the facts and Conclusions, and that this Court set aside and vacate said Findings, Conclusions and Order to Cease and Desist, and order said Commission to dismiss the complaint issued by it against your petitioners.

Fifteenth: That this Court grant such other, further and different relief to petitioners as it may deem just and proper.

Dated: July 25, 1944.

Morton Peyser,
8 West 40th Street,
New York, N. Y.
Attorney for Petitioners,
Triangle Conduit & Cable Co., Inc., and The M. B. Austin Company.

465 UNITED STATES CIRCUIT COURT OF APPEALS.
* * (Caption—8639) * *

STATEMENT OF POINTS UPON WHICH PETITIONERS INTEND TO RELY.

(Filed Jun 20, 1945.)

466 To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Your petitioners, Triangle Conduit & Cable Co., Inc., and The M. B. Austin Company, having duly filed with this Court, their joint and several petition to review and to set aside an Order of the Federal Trade Commission (hereinafter called the Commission) dated June 6th, 1944, now, pursuant to the Order of this Court duly made and entered herein extending the time of petitioners herein within which to file their statement of points as required by the rules of this Court, do hereby jointly and severally make and
467 file the following statement of points upon which they intend to rely in support of their joint and several petition:

1. The Order of the Commission is contrary to law and is beyond the jurisdiction of the Commission, in that it abridges, lessens, nullifies and violates petitioners' constitutional right to meet competition in violation of the 5th amendment to the Constitution of the United States.

2. The Order of the Commission is contrary to law and beyond the jurisdiction of the Commission, in that the Commission thereby attempts to regulate methods of competition which petitioners may employ, their right to engage in free and fair competition and their right to sell and quote at delivered prices.

3. The Order of the Commission is contrary to law and beyond the jurisdiction of the Commission, in that the use of a basing-point, delivered-price formula or system by petitioners and/or other co-respondents, is not illegal per se either at common law or within the intent or meaning of Section 5 of the Federal Trade Commission Act.

4. The Order of the Commission is contrary to law and beyond the jurisdiction of the Commission, in that it enjoins and restricts the use or continued use of a basing-

point, delivered-price system with respect to the sale and distribution of rigid steel conduit by petitioners, and other respondents named in the complaint.

5. The Order of the Commission is contrary to law and beyond the jurisdiction of the Commission, in that it prohibits petitioners herein from absorbing freight in order to meet competition.

6. The Order of the Commission is contrary to law and beyond the jurisdiction of the Commission, in that it prohibits petitioners herein from maintaining and using a uniform delivered price at all points of delivery.

7. The Order of the Commission is contrary to law and beyond the jurisdiction of the Commission, in that it prohibits petitioners herein from using or continuing to use a basing point located at or near the petitioners' point of manufacture notwithstanding trivial freight variances between the actual basing point and the point of manufacture.

8. The Order of the Commission is arbitrary, without basis in law and exceeds the powers and jurisdiction of the Commission, in that it is so vague, indefinite, ambiguous, uncertain and broad in scope, as to fail to provide or constitute a standard of conduct by which petitioners can
468 reasonably be expected to be governed in their affairs.

9. The Order of the Commission is contrary to law and beyond the jurisdiction of the Commission, in that the provisions thereof are penal, oppressive and excessive, and go further than is reasonadly necessary to correct the alleged unfair practices and methods complained of in the Commission's complaint.

10. The Order of the Commission is contrary to law and beyond the jurisdiction of the Commission, in that the findings as to the facts fail to show that the use of a basing-point, delivered-price system, is illegal within the intent and meaning of Section 5 of the Federal Trade Commission Act.

11. The Order goes beyond, is not justified by the findings, and each portion thereof is penal, oppressive and excessive.

12. Sub-paragraph 1 of the Order of the Commission is contrary to law, arbitrary and beyond the power of the Commission, in that it prohibits petitioners herein from quoting a delivered price for rigid steel conduit at any place in order to meet an equally low price of a competitor, thereby depriving petitioners of their legal right so to do.

BLEED THROUGH – POOR COPY

13. Sub-paragraph 3 of the Order of the Commission is contrary to law, arbitrary and beyond the power of the Commission, in that it prohibits petitioners herein from collecting, compiling or circulating any information concerning common carrier transportation charges and from the use thereof for any purpose whatsoever.

14. Sub-paragraphs (a) to (d) inclusive of the Order of the Commission are and each sub-paragraph is, contrary to law, arbitrary and beyond the power of the Commission, in that the things which the petitioners are thereby prohibited from doing do not constitute unfair methods of competition or unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

15. Sub-paragraphs (a) to (d) inclusive of the Order of the Commission are and each of said sub-paragraphs is, contrary to law, arbitrary and beyond the power of the Commission, in that the result of the prohibitions therein contained, will in operation and effect deprive petitioners herein and other respondents, of the right to sell rigid steel conduit at a delivered price and to use or continue to use a basing-point, delivered-price system.

469 16. Sub-paragraphs (a) to (d) inclusive of the Order of the Commission are and each sub-paragraph is, contrary to law, arbitrary and beyond the power of the Commission, in that the result of the prohibitions therein contained, will in operation and effect, deprive petitioners herein and other respondents of the right, in the sale of rigid steel conduit, to meet the equally low price of a competitor at any place.

17. Sub-paragraphs (a) to (d) inclusive of the Order of the Commission are and each sub-paragraph is, contrary to law, arbitrary and beyond the power of the Commission in that the result of the prohibitions therein contained, will in operation and effect, deprive petitioners herein and other respondents of the right, in the sale of rigid steel conduit, to sell and quote conduit in any market, at the prevailing price for conduit of like grade, size and quality.

18. Sub-paragraph (b) of the Order of the Commission is contrary to law, arbitrary and beyond the power of the Commission, in that it prohibits petitioners or other respondents, from quoting or selling rigid steel conduit at delivered prices which are systematically equivalent to the sum of the price in effect at, plus a transportation charge factor from, any point other than the actual shipping point.

19. Sub-paragraph (c) of the Order of the Commission is contrary to law, arbitrary and beyond the power of the Commission, in that it prohibits petitioners herein and other respondents, from quoting or selling rigid steel conduit at delivered prices which systematically include a transportation factor less than the actual cost of transportation from the actual point of shipment to the point of delivery.

20. Sub-paragraph (c) of the Order of the Commission is contrary to law, arbitrary and beyond the power of the Commission, in that the inclusion of a transportation charge less the actual cost of transportation, does not constitute discrimination in price under the Federal Trade Commission Act or Section 2 of the Clayton Act as amended, or otherwise.

21. The findings as to the facts, go beyond the issues and are so vague, ambiguous, indefinite and speculative as to lack the requisites of findings as to facts provided for by law upon which any order may be based.

22. The findings fail to find as against either of the petitioners herein specifically, but seek to connect petitioners herein with the matters referred to in the findings without specific reference to either of petitioners.

470 23. The Commission erred in making any findings or reference in paragraph 5, relating to, the activities of petitioners (and other respondents mentioned in the complaint) arising out of the National Industrial Recovery Act and matters conducted with or arising therefrom.

24. That paragraph 5 of the findings contains mere generalities, wholly immaterial and irrelevant as to the findings of fact, conclusion or the Order with respect to the use or continued use by petitioners or either of them of a basing point or delivered price system.

25. The examples offered by the Commission in paragraph 5(a) of the findings, are generally vague and fail to support the findings as to the facts, conclusion or the Order of the Commission as to the prohibition against the use or continued use by petitioners or either of them of a basing-point or delivered-price system.

26. The statement in paragraph 5(a) that petitioners herein or any of the other respondents "recognized that by virtue of location, some conduit sellers could, by reflecting such advantage of location in their prices, exclude others from selling in certain markets; that their basing-

BLEED THROUGH – POOR COPY

point, delivered-price system offered compensations in the form of higher profits to the favorably located sellers on sales made in his natural territory in return for refraining from pressing his advantage of location; that in order to maintain a price level high enough to permit each seller to sell in the natural territories of other conduit sellers, price competition must be restrained; and that the operation of their formula system of pricing enables each seller to quote to a prospective purchaser at any location the same formula, and thus bring about a condition of matched prices" is not a finding of fact in law.

27. The finding in paragraph 17(a) is wholly irrelevant and immaterial as to petitioners herein, in that said petitioners use a basing point at or near their point of manufacture and petitioners are included in the "seven of twelve plants producing conduit located within the switching limits of Pittsburgh" as stated in paragraph 16, subdivision (a) thereof.

28. Paragraph 17(b) is wholly irrelevant and immaterial as to petitioners herein, in that there is no finding that the petitioners or either of them charged "phantom freight," but on the contrary it is found that the petitioners shipped from locations within the switching limits of Pittsburgh.

29. The finding of the Commission in paragraph 18, subdivision (a) that the use of the basing-point, delivered-
471 price system does not represent competition in the ordinary meaning of that term, is an issue for Congress to decide and determine and the Commission is wholly without jurisdiction to decide or determine said issue.

30. The statement in paragraph 18, subdivision (b) that "Respondents' basing-point, delivered-price formula is a pricing system recognized by economists as a controlled price or monopolistic price system and does not in its operation or results conform to the recognized economic principles which indicate the existence of free or effective competition" is not a finding of fact, and is an attempt by the Commission to usurp the powers of Congress to legislate.

31. The statements in paragraph 18, subdivision (c), are not findings of fact as a matter of law, but are economic and legal conclusions and are wholly beyond the jurisdiction and authority of the Commission.

32. The conclusions of the Commission as set forth in paragraph 19 as to petitioners herein, are not supported by the findings, are contrary to law, wholly beyond the juris-

diction of the Commission, and an attempt on the part of the Commission to legislation.

33. The relief prayed for in the joint and several petition of the petitioners herein should be granted.

Date: June 14, 1945.

Morton Peyser,
Attorney for Petitioners
Office & P. O. Address,
8 West 40th Street,
New York City 18, N. Y.

472 IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Enameled Metals Company, Steelduct Company, and Lawrence R. Quinn, *Petitioners,* *vs.* Federal Trade Commission, *Respondent.*	8640.

PETITION TO REVIEW, MODIFY AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION AND STATEMENT OF POINTS UPON WHICH PETITIONERS INTEND TO RELY.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

And now come your petitioners, Enameled Metals Company, a corporation organized under the laws of the State of Pennsylvania, Steelduct Company, a corporation organized under the laws of the State of Ohio, and Lawrence R. Quinn, by their attorneys, and jointly and severally present their petition to review, modify and set aside the order of the Federal Trade Commission (hereinafter referred to as the "Commission"), made and entered on the 6th day of June, 1944, and in support thereof, respectfully show:

BLEED THROUGH – POOR COPY

I.

Nature of the Proceedings Sought to Be Reviewed.

First. The order of the Commission herein sought to be reviewed, in the manner above stated, arises out of 473 complaint filed and issued by it on January 25, 1941, against Rigid Steel Conduit Association, an unincorporated association (dissolved in 1940), its officers and directors, seventeen (17) manufacturers of rigid steel conduit, Organization Service Corporation, a corporation engaged in furnishing trade association advice, and its officers, The National Electrical Wholesalers Association, an unincorporated association, its officers and the members of its Conduit Committee, and several concerns engaged in the business of selling and distributing by wholesale rigid steel conduit, throughout the United States.

II.

The Commission's Complaint.

Second. The Commission's complaint is in two counts. In the first count, the petitioners and their co-respondents are charged with having engaged in a nation-wide conspiracy by the use of various methods to fix prices in violation of Section 5 of the Federal Trade Commission Act, it being alleged that these various methods constitute unfair competition and unfair acts and practices. The principal method complained of as an unfair method of competition in Count 1 is the use of a basing-point method of determining delivered prices, which the complaint alleges was adopted, maintained, and used as a result of an agreement between the petitioners and their co-respondents.

Third. In Count 2, the use of a basing-point method of determining delivered prices is alleged to be in violation of Section 5 of the Federal Trade Commission Act as an unfair method of competition without regard to agreement. In other words, the mere fact of the use of such a method of determining delivered prices is alleged by the Commission to be an unfair method of competition.

Fourth. The complaint does not charge a violation of the Sherman Anti-Trust Act or a violation of the Clayton Act or the Robinson-Patman Act.

474 Fifth. While the basic charge in Count 1 is that of the use of a delivered price system by agreement, the complaint also alleges various subsidiary methods of controlling prices, namely, an agreement among petitioners and their co-respondents to use uniform price quotation sheets, uniform consigned agency and protective special job contracts; to define what firms and persons constitute a "recognized jobber or dealer"; a method or system of espionage in the investigation of protective special building contracts and other forms of contracts; uniform terms and conditions of sale providing for uniform discounts to be allowed the respective dealers, jobbers, wholesalers or agents; to waive in some instances to competitors their respective economic and competitive advantages; to require by retaliatory price action and otherwise, all firms and individuals engaged in the sale and distribution of conduit in commerce to conform to respondents' agreements and by cooperation and agreement among all the respondents to further and carry out the aforesaid complained of alleged illegal acts.

III.

Petitioners' Answer.

Sixth. The answer of these respondents denied the principal allegations of Count 1 of the Complaint and asserted there had been no conspiracy or agreement as alleged, and in addition, averred that the allegations of the complaint were too vague and insufficient to inform these respondents of the nature and character of the charges against them. As to Count 2, these respondents denied the jurisdiction of the Commission over the subject matter of that count, asserting that the use of a basing-point method of calculating delivered prices without agreement to use said method was not in any sense an unfair method of competition within the meaning of Section 5 of the Federal Trade Com-
475 mission Act, and asserted that said question was solely and simply an economic problem.

IV.

Proceedings Before Examiner and Commission.

Seventh. Upon the completion of the evidence, which consists of approximately 7,000 pages and approximately 1,000 exhibits, requests for findings were filed with the trial examiner. Upon the filing of the report of the trial examiner in July 1942, exceptions were filed by these and the other respondents to the findings of the examiner as well as to his failure to find, as requested. In addition, motions were filed by some of the respondents to strike out testimony, which were overruled by the Commission. The record discloses that wherever an objection and exception were taken, such objection and exception were for the benefit of all parties unless a disclaimer was noted at the time.

Eighth. The case was argued orally by the parties thereto before the Commission on May 11th and 12th, 1943, and on June 6, 1944, the Federal Trade Commission issued and subsequently served upon petitioners its findings as to the facts and its conclusions, and the Order to Cease and Desist entered thereon. A copy of the Order to Cease and Desist is annexed hereto and made a part hereof as Exhibit "A."

V.

Jurisdiction and Venue of Court.

Ninth. The jurisdiction and venue of this Court are based upon Section 225, Title 28, U.S.C. (Section 128 of the Judicial Code, as amended) and Section 45, Title 15, U.S.C. (Section 5 of the Federal Trade Commission Act aforesaid).

Tenth. These petitioners, as well as the other respondents in the case, are charged by the Commission with a conspiracy, agreement, and combination which alleges the
476 carrying out, maintenance, and use in this Circuit of the alleged unfair method of competition. In addition, respondent manufacturers have allegedly used within this Circuit the alleged unfair method of competition complained of and the acts or practices in question, and further, respondents Clayton Mark and Company, The M. B. Austin Company, Republic Steel Corporation, and Youngstown Sheet and Tube Company have places of business in and carry on business within this Circuit. Numerous acts are

imputed to these petitioners and their co-respondents and alleged to have taken place during and in the carrying out of the alleged conspiracy and use of the basing-point method which have occurred within this Circuit.

VI.

Prayer for Relief.

Wherefore, believing that the Findings, Conclusions, and Order of the Commission herein are erroneous, unauthorized, and without foundation in law or in fact, your petitioners pray:

1. That a certified copy of this petition be forthwith served by the Clerk of this Court upon the Federal Trade Commission and that said Commission be required forthwith, in conformity with the statute, to certify and file in this Court a transcript of the entire record in the proceeding aforesaid, including all of the evidence taken and the Findings as to the Facts and Conclusions and the Order to Cease and Desist of the Commission.

2. That the Federal Trade Commission be required, further, to certify and file in this Court the Trial Examiner's Report upon the Evidence and the Exceptions duly filed thereto by and on behalf of petitioners and their co-respondents.

3. That this Court review the entire record in this proceeding, including all the evidence taken, the several objections and exceptions made on behalf of petitioners and
477 their co-respondents in the course of the proceedings before the Trial Examiner, the Trial Examiner's Report upon the evidence, the Exceptions filed thereto by and on behalf of petitioners and their co-respondents, the several motions made on behalf of petitioners and their co-respondents before the Commission, and the rulings thereon by the Commission, the Order to Cease and Desist of the Commission, including its Findings of Fact and Conclusion, and set aside, vacate, or modify said Findings, Conclusions, and Order to Cease and Desist, and that this Court further order said Commission to dismiss the Complaint issued by it against the petitioners.

Statement of Points Upon Which Petitioners Intend to Rely.

1. The Order to Cease and Desist is unlawful and exceeds the jurisdiction of the Commission, in that it abridges and nullifies petitioners' constitutional right to meet competi-

BLEED THROUGH – POOR COPY

tion in violation of the 5th Amendment to the Constitution of the United States and unlawfully usurps the legislative functions and powers of Congress in violation of Article I, Section 1 of the Constitution of the United States by limiting and proscribing beyond the Commission's power the methods of competition which petitioners may employ, and enjoins, proscribes and fetters petitioners' right to engage in free and fair competition and to sell rigid steel conduit at delivered prices.

2. The Order to Cease and Desist is unlawful and exceeds the jurisdiction of the Commission, in that there is no substantial evidence that petitioners or any of them have entered into, continued, cooperated in, or carried out any planned common course of action, understanding, agreement, combination, or conspiracy, or threatened so to do, with respect to doing or performing any of the acts and things prohibited in Paragraphs 1 through 9 of said Order to Cease and Desist, in violation of Section 5 of the Federal Trade Commission Act.

478 3. The Order to Cease and Desist is unlawful and exceeds the jurisdiction of the Commission in that it enjoins methods of competition and acts and practices which are not specified in the complaint and are not within the issues raised by the pleadings in so far as it requires petitioners or any of them to do or to refrain from doing any of the following things:

Count 1.

(a) to "cease and desist from * * * continuing, cooperating in, or carrying out any planned common course of action * * * between any two or more * * * (of them) or between any one or more * * * (of them) and others not parties hereto" (Preamble);

(b) from "Quoting or selling rigid steel conduit at prices calculated or determined pursuant to or in accordance with the basing-point, delivered-price system; or quoting or selling rigid steel conduit at prices calculated or determined pursuant to or in accordance with any other plan, system, or formula which produces identical price quotations or prices for rigid steel conduit by respondents using such plan, system, or formula at points of quotation or sale, or to

particular purchasers, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents as against any of the other respondents."

(c) from "establishing, fixing, or maintaining prices, terms, or conditions of sale for rigid steel conduit, or adhering to any prices, terms, or conditions of sale so fixed or maintained."

(d) from "Collecting, compiling, circulating, or exchanging information concerning common carrier transportation charges used or to be used as a factor in computing the price of rigid steel conduit; or using, directly or indirectly, any such information so collected, compiled, or received as a factor in computing the price of rigid steel conduit."

Note:—Material underscored indicates particular language which is objected to.

479 (e) from "Collecting, compiling, circulating, or exchanging 'freight adders', delivery charge booklets, or other information concerning delivery charges on rigid steel conduit used or to be used as a factor in computing the price of such conduit; or using, directly or indirectly any such information so collected, compiled, or received as a factor in computing the price of rigid steel conduit."

(f) from "Formulating or adopting consigned stock, specific building, or any other forms of contracts or agreements concerning the sale or distribution of rigid steel conduit, or using any contracts or agreements so formulated or adopted, for the purpose or with the effect of aiding or assisting in arriving at or maintaining uniform prices, terms, or conditions in the sale or distribution of such conduit."

(g) from "Doing or causing any of the things forbidden in the preceding paragraphs of this order to be done through respondents Charles Donley, Herbert S. Blake, Organization Service Corporation, or any other individual, corporation, or organization."

4. The Order to Cease and Desist is unlawful and exceeds the jurisdiction of the Commission, in that it is so vague, indefinite and ambiguous as not to provide or constitute a standard of conduct by which petitioners can reasonably be expected to be governed in the conduct of their affairs, and exposes respondents to penalties and, in so doing, violates

BLEED THROUGH = POOR COPY

the 5th and 6th Amendments to the Constitution of the United States, in so far as it requires petitioners or any of them to do or to refrain from doing any of the things heretofore referred to in Assignment No. 3 (a) through (g), supra, or any of the following additional things:

Note:—Material underscored indicates particular language which is objected to, except as to Count 2, which is objected to in its entirety.

Count 2.

(a) • • • "from doing any of the following things for the purpose or with the effect of systematically matching 480 delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill nets received on sales to different purchasers:"

(b) from "Quoting or selling rigid steel conduit at delivered prices calculated as, or systematically equivalent to, the sum of the price in effect at, plus a transportation charge factor from, any point other than the actual shipping point."

(c) from "Quoting or selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination."

(d) from "Discriminating among purchasers by quoting or selling rigid steel conduit at prices which systematically differ in terms of mill nets according to the location of purchasers, and which mill nets, plus common carrier transportation charges to the respective locations of such purchasers, produce delivered costs identical with those to such purchasers from differently located respondents."

4. In so far as the Order of the Commission undertakes to order the respondents to cease and desist from using the basing-point method of determining delivered prices without agreement, the same is beyond the jurisdiction of the Commission.

5. The use of a basing-point method of determining delivered prices is not unfair competition within the meaning of Section 5 of the Federal Trade Commission Act.

6. In so far as the Commission undertakes to order the respondents to cease and desist from discriminating among purchasers as provided in paragraph (d) in the second part

of the Order of the Commission, the same is not within the jurisdiction of the Commission under the allegations of the Complaint.

481 7. In so far as the Commission undertakes to order the respondents to cease and desist without agreement in using a basing-point method of determining delivered prices, the same is beyond the jurisdiction of the Commission and is solely a legislative question.

8. The purported "Findings as to the Facts" are not supported by the evidence, go beyond the issues and are improper in form and substance, and are so incomplete, indefinite, speculative and argumentative as wholly to lack the requisites of Findings as to the Facts provided for by law and upon which any order herein may be based, in that:

(a) The Commission has failed to consider and to make findings of fact as to all of the evidence that is material to all of the issues and in making its purported "Findings as to the Facts" has considered and has made its findings based only on a small part of the evidence and has ignored and has made no findings whatsoever based on large quantities of direct and uncontradicted evidence in support of the respective defenses of petitioners and their co-respondents below and on evidence which met, explained, contradicted and otherwise related to evidence presented by the Commission. If the Commission had considered and made findings as to all of the material evidence, as above stated, there would be no basis in fact for the findings as made and for the Order entered thereon.

(b) The extensive quotations of, excerpts from and references to testimony and exhibits in the findings are incomplete, misleading and do not fairly represent or characterize the evidence.

9. The Commission erred in its Findings in taking into consideration evidence as to the activities of some of the

482 respondents pursuant to, or arising out of compliance with the provisions of the National Industrial Recovery Act. Said testimony was incompetent and was not the proper basis for a Finding as against any of the respondents of an illegal combination, inasmuch as respondents were required, under the provisions of the National Industrial Recovery Act, to obey said act and, in the event of refusal so to do, they were subject to severe penalties.

10. The evidence does not show the existence of the conspiracy alleged in the Complaint.

BLEED THROUGH – POOR COPY

11. The evidence does not show that all of the alleged conspirators were illegally connected with the alleged conspiracy.

12. The Commission erred in overruling the exceptions of these petitioners and in failing to find as indicated in said exceptions, Nos. 8 to 16, inclusive, Nos. 19 to 26, inclusive, and Nos. 28 to 30, inclusive.

13. The Commission erred in its Finding in Paragraph One (r) as follows: "• • • although no representatives of either Laclede Steel or Laclede Tube attended meetings of the association, they both participated in carrying on the association activities and Leclede Steel continued to cooperate with RSCA and its members until that association was dissolved," there being no evidence to support such a finding.

14. The Commission erred in basing its Order as to Steelduct Company on the mere Finding in Paragraph One (t) that this company was "a member of RSCA and participated in its affairs until the dissolution of that association," such a finding not being a proper basis for the inference that said company was a party to the alleged conspiracy.

15. The Commission erred in its Finding Paragraph One (1-c) with reference to Charles Donley, in that said finding fails to report the true facts with regard to the activities of the said Donley and the connection of the individual respondents with said activities.

483 16. The Commission erred in its Finding in Paragraph Four (c) in that said finding wholly inadequately presents the subject matter of said finding.

17. The Commission erred in its Finding in Paragraph Four (e) in that said finding does not adequately present the matter and the facts as reported are incomplete and misleading.

18. The Commission erred in its Finding in Paragraph Five (a) in so far as it finds that the respondents have acted collectively in the establishment and maintenance of the basing-point, delivered-price system in its present form, and in the conclusions therein stated, as the evidence does not support the conclusions.

19. The Commission erred in its Finding in Paragraph Five (b) inasmuch as said finding is based on incidents occurring under the National Industrial Recovery Act.

20. The Commission erred in its Finding in Paragraph Six (a) in so far as it finds that "Mistakes by conduit sellers

in the selection of the railroad tariff rate to be uesd in a particular instance were a fruitful source of differences in the delivered prices quoted," inasmuch as it fails to point out that the undisputed evidence showed that such mistakes were unintentional and were corrected as soon as the same were discovered.

21. The Commission erred in its Finding in Paragraph Six (f) as a conclusion thereof is not justified by the evidence.

22. The Commission erred in its Finding in Paragraph Seven in that said finding and conclusion are not supported by the evidence.

23. The Commission erred in its Finding in Paragraph Eight (b) in that said finding and conclusion are not supported by the evidence.

24. The Commission erred in its Findings in Paragraph Eight (c) in that said finding does not adequately present all the facts and is not supported by the evidence.

484 25. The Commission erred in its Finding in Paragraph Nine (a) in failing to find that the purpose and effect of the duplication of the contracts referred to in said paragraph was to perpetrate a fraud upon the conduit sellers, and in failing to find that the activities of the various conduit sellers in this respect was wholly one of individual action and that but very few of the conduit sellers undertook such activity.

26. The Commission erred in its Finding in Paragraph Nine (d) and (e) in failing to find that the purpose of the investigations therein referred to was to prevent fraud upon the conduit sellers and in pointing out a single instance, and in failing to find as a fact that the undisputed evidence showed beyond question numerous instances of gross fraud perpetrated upon the conduit sellers.

27. The Commission erred in its Finding in Paragraph Eleven (c) in that the evidence does not support the conclusions therein stated.

28. The Commission erred in its Finding in Paragraph Twelve in that the conclusion therein stated is not supported by the evidence and in that the acts therein recited are those of the individual companies in furtherance of their own individual interests and not in any sense a part of the conspiracy alleged in the Complaint.

29. The Commission erred in its Finding in Paragraph Thirteen (a) in that said finding is based upon incompetent testimony.

BLEED THROUGH – POOR COPY

30. The Commission erred in its Finding in Paragraph Thirteen (c) in failing to point out that the incident therein referred to is a single one and that the purpose of the alleged classification of purchasers was to eliminate a fraudulent practice.

31. The Commission erred in its Finding in Paragraph Fifteen (a) inasmuch as said material took place during the National Industrial Recovery Act and was required by that law, and in also failing to find that the bids as
485 reported varied in so far as the discounts vary and that the testimony of the witnesses of the Commission showed that the variation in discounts was a determining factor in the letting of said contracts. The Commission erred in failing to find as to the Panama Canal bid, open January 6, 1938, that, in so far as there were variations in the discounts of said bids, the bids differed and also that it was common practice for the conduit sellers to make bids on Government contracts simply for the purpose of keeping themselves on the Government lists, and also in failing to point out that the bids of the agents differed by reason of the discounts offered.

32. The Commission erred in its Finding in Paragraph Fifteen (b) in that said finding gives an inadequate and misleading presentation of the matter of the finding.

33. The Commission erred in its Finding and Conclusion in Paragraph Fifteen (c) in that it has ignored the uncontradicted explanations of Exhibit 576 (a, b) and Exhibit 621.

34. The Commission erred in its Finding and Conclusion in Paragraph Sixteen (c) in that it has failed to find as a fact that there was no refusal on the part of the conduit sellers to quote true f. o. b. mill prices and that the trade generally desired delivered prices.

35. The Commission erred in its Finding and Conclusion in Paragraph Sixteen (d) in that the finding and conclusions are inadequate and fail to take into consideration all of the evidential facts.

36. The Commission erred in its Finding and Conclusion in Paragraph Sixteen (e) as follows: "In occasional instances in particular localities or to particular purchasers one or more conduit sellers, through intent or error, quote or sell conduit at prices which are not in accord with the basing-point delivered prices concurrently offered in the

same localities or to the same purchasers by other con-
486 duit sellers. In such situations, when two or more but not all conduit sellers adhere to the formula prices, the effects produced by such adherence are similar in character but less in degree than those resulting when all conduit sellers adhere to the formula prices" as said finding and conclusions are not supported by the evidence.

37. The Commission erred in its Findings in Paragraph Seventeen (a), (b), (c), (d) and (e) in that the findings and conclusions therein are not supported by the evidence and fail to adequately present all the facts. Said findings and conclusions are based primarily upon the testimony of economists and are purely theoretical concepts of the conduit business.

38. The Commission erred in its Findings and Conclusions in Paragraph Eighteen (a), (b) and (c) in that the findings and conclusions thereof are not supported by the evidence, are purely economic theories, and cannot legally supply a basis for the findings and conclusions therein. Furthermore, the findings and conclusions are as to matters not within the scope of the Complaint.

39. The Commission erred in its findings in Paragraph Nineteen (a) and (b), as said findings and conclusions are not supported by the evidence and include findings and conclusions which are beyond the scope of the Complaint.

40. The case of the Commission rests primarily upon circumstantial evidence and the Commission in its Findings and Conclusions has totally ignored the settled principle of law that in dealing with circumstantial evidence where equal inferences are permissible that which is innocent is to be taken.

Dated July 26, 1944.

N. Denning Stewart,
Stewart and Lewis,
1017 Park Building,
Pittsburgh, Pennsylvania,
Attorneys for above named Petitioners.

491 Endorsed: In the U. S. Circuit Court of Appeals. • • (Caption—8640) • •. Petition to Review, Modify and Set Aside Order of Federal Trade Commission and Statement of Points Upon Which Petitioners Intend to Rely. Filed July 27, 1944. Kenneth J. Carrick, Clerk.

BLEED THROUGH – POOR COPY

492 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Clayton Mark & Company, Fretz-Moon Tube Company, Inc., Laclede Steel Company, National Electric Products Corporation, Republic Steel Corporation, Walker Brothers, The Youngstown Sheet and Tube Company, James M. Barton, I. A. Bennett, and Hervey S. Walker, *Petitioners,* *against* Federal Trade Commission, *Respondent.*	8642.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed July 28, 1944, Kenneth J. Carrick, Clerk.)

Dated July 26, 1944.

493 To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now come your Petitioners Clayton Mark & Company, a Delaware corporation; Fretz-Moon Tube Company, Inc., a Pennsylcania corporation; Laclede Steel Company, a Missouri corporation; National Electric Products Corporation, a Delaware corporation; Republic Steel Corporation, a New Jersey corporation; Walker Brothers, a Pennsylvania corporation; The Youngstown Sheet and Tube
494 Company, an Ohio corporation; James M. Barton; I. A. Bennett; and Hervey S. Walker, by their attorneys, and jointly and severally present their petition to review and set aside the order of the Federal Trade Commission (hereinafter referred to as the Commission), made and entered on the 6th day of June, 1944, and in support thereof respectfully show as follows:

Statement of the Nature of the Proceedings as to Which Review Is Sought.

First: The order of the Commission herein which your Petitioners seek to have reviewed and set aside arises out of a complaint issued by the Commission on January 25, 1941, (hereinafter sometimes called the complaint) against (a) Rigid Steel Conduit Association, an unincorporated association (dissolved in 1940), certain individuals alleged to be its officers and to constitute its board of directors, and certain corporations and individuals alleged to be its members; (b) The National Electrical Wholesalers Association, an unincorporated association, and certain individuals alleged to be its officers and members of its Conduit Committee, and certain concerns alleged to be members of said Association; and (c) certain other individuals and concerns who are alleged to have cooperated with other respondents in respect of matters alleged in the complaint.

A. The Commission's Complaint.

Second: The complaint contains two counts, in both of which the Commission charges violation of Section 5 of the Federal Trade Commission Act (15 U. S. C. § 45). In
495 Count I it is alleged that the Petitioners and other respondents have entered into and are engaged in an unlawful understanding, agreement, combination and conspiracy for the purpose and with the effect of substantially restricting, suppressing, eliminating and frustrating actual and potential competition as to price, and otherwise, in the sale and distribution of rigid steel conduit (hereinafter called conduit) in commerce between and among the various states of the United States and in the District of Columbia. The complaint further alleges that, pursuant to, and in furtherance of, said unlawful understanding, agreement, combination and conspiracy, the Petitioners and other respondents adopted, maintained and used certain practices and methods, including the basing-point method of quoting and selling conduit.

Third: Count II of the complaint is directed against the corporate Petitioners, twelve other corporations (as against five of which the complaint was dismissed) and a partnership consisting of four named individuals, all of whom are together referred to in the complaint as respondent "conduit sellers". That Count charges, in substance, that the use by any such respondent of the basing-point method of quoting and selling conduit, with knowl-

BLEED THROUGH – POOR COPY

edge that the other respondent "conduit sellers" use the same method of quoting and selling, constitutes in itself, irrespective of any agreement, combination or conspiracy, an unfair method of competition in violation of the provisions of Section 5 of the Federal Trade Commission Act.

Fourth: In Count II it is alleged by way of specification that each of the respondent "conduit sellers", including the Petitioners, with knowledge that the other respond-
496 ent "conduit sellers" simultaneously do likewise, generally refrains from quoting prices f.o.b. its place of production or shipment that are independent of and unrelated to delivered price quotations determined from a basing-point formula; that, in arriving at amounts quoted in its published price cards, it specifies that delivered costs to any intending purchaser at his destination shall be the figure resulting from the use of a formula made up of a basing-point price plus freight adders or factors applying from one or more specified basing points; and that through the use of such formula uniformity in delivered price quotations of all such conduit sellers at a given time and destination is inherent in, and a necessary result of, "such method or system of basing-point-delivered-price-quotations." It is further alleged in Count II that each such conduit seller habitually and systematically demands, charges, accepts and receives as an incident to such basing-point method of delivered price quotations larger amounts for products of equal quality and quantity from their respective customers located near their respective places of business and manufacture than from other customers located at greater distances therefrom and thereby causes such nearby customers to pay more, and the more distant customers to pay less, than would otherwise be the case, thereby depriving the nearby customers of price advantages which they would naturally enjoy by reason of their proximity to points of production.

Fifth: The acts, practices and methods of each respondent "conduit seller" as described in Count II of the complaint (when done and used as, and with the result, therein described) are therein alleged (a) to be to the preju-
497 dice of the public; (b) to have a dangerous tendency to hinder, lessen and prevent, and to have actually hindered, lessened and prevented competition in price in the sale of conduit in commerce; (c) to have the capacity and tendency unreasonably to restrain, and to have unreasonably restrained, such commerce; (d) to have a danger-

ous tendency to create in each respondent "conduit seller" a monopolistic control over price in the sale and distribution of conduit; (e) to cause unfair and discriminatory treatment among the customers of each such respondent "conduit seller"; and, therefore, (f) to constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

B. The Petitioners' Answers.

Sixth: The Petitioners filed eight separate answers to the complaint as follows: one by Petitioner Clayton Mark & Company; one by Petitioners Fretz-Moon Tube Company, Inc.; one by Petitioner Laclede Steel Company; one by Petitioners National Electric Products Corporation and I. A. Bennett; one by Petitioner Republic Steel Corporation; one by Petitioners Walker Brothers and Hervey S. Walker; one by Petitioner The Youngstown Sheet and Tube Company; and one by Petitioner James M. Barton. In such answers, the respective Petitioners, in substance, denied the allegations of Count I of the complaint as to the existence of the understanding, agreement, combination and conspiracy alleged therein and denied other material allegations of said Count. In such answers, the respective Petitioners in substance admitted the allegation of Count II of the complaint that they, respectively, generally
498 quote and sell conduit at prices determined in accordance with the basing-point method of pricing, namely, at delivered prices based on their respective announced prices therefor at certain basing points, to which the amount of rail freight charges from the basing point to the place of delivery is added to arrive at the delivered prices, and denied other allegations of said Count II and in some of such answers it was specifically alleged that the respective policies and practices of the Petitioners in the sale of conduit are lawful and within their respective rights to meet competitive prices and in so doing to sell their respective products at different locations and to different customers at such different prices as may be required to that end.

Introduction of Evidence and Final Hearing.

Seventh: At numerous hearings before a Trial Examiner appointed by the Commission evidence to support the charges of the complaint was presented on behalf of the Commission and evidence in defense against such charges was presented on behalf of the respective Petitioners and other respondents. Thereafter the Trial Examiner filed his "Report upon the Evidence" and exceptions thereto were filed by the respective Petitioners and other respondents; and other exceptions to such Report were filed by counsel for the Commission. The cause came on for hearing before the Commission in May, 1943, on briefs and oral argument.

The Order of Which Review Is Sought.

Eighth: On June 6, 1944, the Commission issued its Findings as to the Facts and Conclusion and its Order
499 to Cease and Desist entered thereon; and the Commission subsequently served copies of such Findings, Conclusion and Order upon the respective Petitioners. A copy thereof is annexed hereto as Exhibit A and made a part hereof.

Facts and Statutes Upon Which Venue Is Based.

A. The Statutes.

Ninth: The statutes under which this Court has jurisdiction to grant the relief prayed for in this petition are Section 128 of the Judicial Code (28 U. S. C., Section 225), and Section 5 of the Federal Trade Commission Act (15 U. S. C., Section 45). 28 U. S. C., Section 225, provides in paragraph (e):

"The Circuit Courts of Appeal are further empowered to enforce, set aside or modify orders of the Federal Trade Commission as provided in Section 45 of Title 15 • • • ."

15 U. S. C., Section 45, provides in paragraph (c) in part as follows:

"(c). Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may

obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commis-
500 sion be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, • • •."

B. The Facts.

Tenth: Your Petitioners Laclede Steel Company, Republic Steel Corporation and The Youngstown Sheet and Tube Company maintain sales offices for the sale of conduit and other commodities in this Circuit at Chicago, Illinois; your Petitioner Clayton Mark & Company has its principal place of business at Evanston, Illinois, in this Circuit; and your Petitioners Fretz-Moon Tube Company, Inc., National Electric Products Corporation, and Walker Brothers otherwise carry on business in this Circuit within the meaning of Section 5 of the Federal Trade Commission Act. Each of your Petitioners James M. Barton, I. A. Bennett and Hervey S. Walker is an officer of one of the aforesaid Corporate Petitioners which carries on business in this Circuit within the meaning of Section 5 of the Federal Trade Commission Act as aforesaid. Moreover, your Petitioners are required by said order of the Commission to cease and desist from using in or in connection with the sale of conduit in commerce, as the term "commerce"
501 is defined in the Federal Trade Commission Act, certain acts and practices, among others the quoting and selling of conduit at prices calculated or determined pursuant to or in accordance with the basing-point method of quoting and selling conduit.

BLEED THROUGH – POOR COPY

Prayer for Relief.

Wherefore, your Petitioners pray:

1. That a copy of this petition be served forthwith by the Clerk of this Court upon the Federal Trade Commission pursuant to the provisions of subdivision (c) of Section 5 of the Federal Trade Commission Act (15 U. S. C., Section 45 (c)).
2. That this Court review said Order of the Commission, together with its Findings as to the Facts and Conclusion, and set aside and vacate said Findings, Conclusion and Order.
3. That this Court grant such other and further relief as this Court may deem proper.

Dated July 26, 1944.

Cravath, Swaine & Moore,
by Hoyt A. Moore,
A Partner,
Attorneys for Petitioners,
15 Broad Street,
New York 5, N. Y.

503 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—8642) * *

STATEMENT OF POINTS UPON WHICH THE PETITIONERS INTEND TO RELY.

(Filed June 22, 1945. Kenneth J. Carrick, Clerk.)

To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now Come the petitioners above-named, they having duly filed in this Court on the 28th day of July, 1944, their petition to review and set aside an Order to Cease and Desist of the Federal Trade Commission (hereinafter called
504 the Commission) made on the 6th day of June, 1944, and pursuant to orders of this Court duly made on the 4th day of August, 1944, and the 6th day of March, 1945, jointly and severally make and file this their statement of points in which they set out the assignments of error which they respectively intend to urge and rely upon in support of said petition.

I.

1. The Commission exceeded its powers in ordering, in that paragraph of the Order* (which is hereinafter referred to as Paragraph I of the Order) that begins with the words "It is ordered", that the respondents (before the Commission) named in that paragraph, and "their respective officers, representatives, agents and employees, in or in connection with the offering for sale, sale, and distribution of rigid steel conduit in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between any two or more of said respondents, or between any one or more of said respondents and others not parties" to the complaint or order of the Com-
505 mission, to do or perform the things set out in subparagraph 1 of Paragraph I of the Order, because:

(a) There is no substantial evidence in the record herein that said respondents or any of them, or any officers, representatives, agents or employees of any of them, have at any time entered into, continued, cooperated in or carried out any planned common course of action, understanding, agreement, combination or conspiracy to do, or at the time of the making of the Order, or at any other time, threatened or intended to enter into, continue, cooperate in or carry out any planned common course of action, understanding, agreement, combination or conspiracy to do, any of the things set out in said subparagraph 1.

(b) It forbids each of said respondents to meet in its delivered prices for rigid steel conduit at any place an equally low price of a competitor, thereby depriving such respondent of a right preserved to it in Section 2 of the Clayton Act, as amended, and contravening the public policy declared by said Section 2.

(c) Said subparagraph 1 of Paragraph I of the Order is for those reasons arbitrary and without basis in law.

2. The Commission exceeded its powers in ordering,

* The term "the Order" is used in this Statement of Points to indicate the order to cease and desist of the Commission that is under review herein.

in Paragraph I of the Order, that said respondents
506 cease and desist as aforesaid in respect of the things set out in subparagraph 3 thereof, because:

(a) It prohibits the compilation and circulation of accurate statements of freight rates that are matters of public record, and the use of freight rates so compiled and circulated.

(b) It prohibits the compilation of such freight rates or of information relative thereto by or for any one of said respondents for its own use.

(c) Said subparagraph 3 of Paragraph I the Order is for those reasons arbitrary and without basis in law.

3. The Commission exceeded its powers in ordering in Paragraph I of the Order that said respondents cease and desist, as aforesaid, in respect of the things set out in subparagraph 5 thereof, because:

(a) It prohibits each of said respondents from obtaining information from the natural and probable sources thereof relative to the nature of the businesses of purchasers and prospective purchasers of rigid steel conduit that may be necessary for such respondent to have in order to avoid violation by him of provisions of Section 2 of the Clayton Act, as amended.

(b) There is no substantial evidence in the record herein that information of the nature of that referred to in said subparagraph 5 has ever been circulated or ex-
507 changed by said respondents or any of them for any purpose other than that stated in the foregoing subparagraph (a) of this paragraph 3.

(c) As a matter of combined fact and law there is no justification or adequate basis in the record for the drawing by the Commission of the inference that such information was circulated or exchanged by said respondents or any of them for an illegal purpose, such as the "blacklisting" of any purchaser or prospective purchaser of conduit, or for any other purpose in restraint of trade, when the law reveals an entirely legitimate need and use for such information.

(d) Said subparagraph 5 of Paragraph I of the Order is for those reasons arbitrary and without basis in law.

4. The Commission exceeded its powers in ordering in Paragraph I of the Order that said respondents cease

and desist, as aforesaid, in respect of the things set out in subparagraph 6 thereof, because:

(a) There is no substantial evidence in the record herein that any two or more of said respondents, or any one of said respondents and any other person, have ever determined upon the location, establishment, maintenance or discontinuance of any warehouse or warehouses or other place or places for the stocking of supplies of rigid steel conduit or that any such warehouse or other place
508 has ever been located, established, maintained or discontinued pursuant to or by reason of any such determination.

(b) Said subparagraph 6 of Paragraph I of the Order is for that reason arbitrary and without basis in law.

5. The Commission exceeded its powers in ordering in Paragraph I of the Order that said respondents cease and desist, as aforesaid, in respect of the things set out in subparagraph 9 thereof through the respondent (before the Commission) Charles Donley, or through any other individual, corporation or organization, because:

(a) It prohibits each of said respondents from employing the services of said Donley or of any other individual, corporation or organization, including any individual in the employ of such respondent, in an entirely legitimate manner.

(b) There is no substantial evidence in the record herein that the services of said Donley in the compiling of freight rates have ever been employed by said respondents or any of them in any manner not legitimate.

(c) Said subparagraph 9 of Paragraph I of the Order is for those reasons arbitrary and without basis in law.

6. The Commission exceeded its powers in the paragraph of the Order (which is hereinafter referred to
509 as Paragraph V of the Order) that begins "It is further ordered that each of the corporate respondents Clayton Mark & Company * * *" in that said paragraph in various respects is so vague, indefinite and ambiguous as not to provide or constitute standards of conduct by which the respondents named therein, or any of them, can reasonably be expected to be governed in the conduct of their respective affairs or to shape the conduct thereof, in so far as said paragraph orders that said respondents, "their respective officers, representatives, agents and employees, * * * in or in connection with

BLEED THROUGH – POOR COPY

the offering for sale, sale, and distribution of rigid steel conduit in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from doing" the things set forth in said paragraph "for the purpose or with the effect of systematically matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill nets received on sales to different purchasers."

7. The Commission exceeded its powers in ordering in Paragraph V of the Order that said respondents, their respective officers, representatives, agents and employees, in or in connection with the offering for sale, sale and distribution of rigid steel conduit in such commerce cease and desist from doing the things set out in subparagraph (a) thereof, namely, "Quoting or selling rigid steel
510 conduit at prices calculated or determined pursuant to, or in accordance with, the basing-point, delivered-price system", because:

(a) The prohibition of the things set out in said subparagraph (a) is based by the Commission in part on the provisions of Section 2 of the Clayton Act, as amended, relative to discriminations in price (see Paragraph Seventeen (a) of the Findings as to the Facts) and is in that respect not within the charges of the Commission's complaint, in that (i) the acts, things, practices, methods and agreements of the respondents which are alleged in Count I of the complaint are charged in Paragraph Seven of said Count to constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, and (ii) the acts, practices and methods of the respondents which are named in Count II of the complaint are likewise charged in Paragraph Four of said Count to constitute unfair methods of competition in commerce within the intent and meaning of said Section 5 of the Federal Trade Commission Act, and (iii) the complaint does not in terms charge any violation of Section 2 of the Clayton Act, as amended.

(b) The proceeding before the Commission was not begun or carried on as a proceeding under Section 2 of the Clayton Act, as amended.

511 (c) The conduct of the proceeding before the Commission was inconsistent with the provisions of Sec-

tion 11 of the Clayton Act, as amended, relative to proceedings before the Commission on charges of violation of the provisions of that Act, in that the Commission delegated to a Trial Examiner authority to hold hearings and take evidence relative to the charges in the Commission's complaint.

(d) The Order, in so far as it was based by the Commission on discrimination in price by said respondents, including the petitioners herein, was made without reference to any of the provisos contained in said Section 2 of the Clayton Act, as amended, or any of the defenses provided therein, and without findings by the Commission in respect thereof.

(e) The prohibitions of said subparagraph (a) will, in their operation and effect, deprive said respondents, including the petitioners herein, of their respective rights to sell rigid steel conduit at delivered prices.

(f) The prohibitions of said subparagraph (a) will, in their operation and effect, deprive said respondents, including the petitioners herein, of their respective rights in the sale of rigid steel conduit to meet at any place an equally low price of a competitor.

512 (g) The prohibitions of said subparagraph (a) will, in their operation and effect, deprive said respondents, including the petitioners herein, of their respective rights in the sale of rigid steel conduit to quote and sell such conduit in any market at the price there prevailing for conduit of like grade, quality and size.

(h) Said subparagraph (a) is so vague, indefinite and ambiguous that it does not provide or constitute any standard by which said respondents or any of them can reasonably be expected to be governed in the conduct of their respective affairs or to shape the conduct thereof, in that it prohibits quoting or selling rigid steel conduit at prices calculated or determined pursuant to, or in accordance with, any basing-point, delivered price system without reference to the legality of the use thereof.

(i) Said subparagraph (a) of Paragraph V of the Order is for those reasons arbitrary and without basis in law.

8. The Commission exceeded its powers in ordering in Paragraph V of the Order that said respondents, their respective officers, representatives, agents and employees, in or in connection with the offering for sale, sale and dis-

BLEED THROUGH – POOR COPY

tribution of rigid steel conduit in such commerce cease and desist from doing the things set out in subparagraph
513 (b) thereof, namely, "Quoting or selling rigid steel conduit at delivered prices calculated as, or systematically equivalent to, the sum of the price in effect at, plus a transportation charge factor from, any point other than the actual shipping point" for the same respective reasons as those stated in subparagraphs (a) to (i), inclusive, of paragraph 7 of this Statement relative to subparagraph (a) of Paragraph V of the Order, and for the following additional reason:

(j) Said subparagraph (b) is so vague, indefinite and ambiguous that it does not provide or constitute a standard by which said respondents or any of them can reasonably be expected to be governed in the conduct of their respective affairs or to shape the conduct thereof, in so far as said subparagraph prohibits the quoting or selling of rigid steel conduit at delivered prices which are systematically equivalent to the sum of the price in effect at, plus a transportation charge factor from, any point other than the actual shipping point, and in that respect the Order is additionally arbitrary and without basis in law.

9. The Commission exceeded its powers in ordering in Paragraph V of the Order that said respondents, their respective officers, representatives, agents and employees, in or in connection with the offering for sale, sale and distribution of rigid steel conduit in such commerce,
514 cease and desist from doing the things set out in subparagraph (c) thereof, namely, "Quoting or selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transaction factor greater or less than the actual cost of transportation from point of shipment to destination", for the same respective reasons as those stated in subparagraphs (a) to (i), inclusive, of paragraph 7 of this Statement relative to subparagraph (a) of Paragraph V of the Order, and for the following additional reasons:

(j) Said subparagraph (c) is so vague, indefinite and ambiguous that it does not provide or constitute a standard by which said respondents or any of them can reasonably be expected to be governed in the conduct of their respective affairs or to shape the conduct thereof, in so far as said subparagraph prohibits the quoting or sell-

ing of rigid steel conduit at delivered prices which systematically include a transportation factor greater or less than the actual cost of transportation from point of shipment to point of delivery.

(k) The prohibition against the inclusion in a delivered price of a transportation factor less than the actual cost of transportation from point of shipment to point of delivery is without basis in law, because the inclusion by any of said respondents in a delivered price of rigid
515 steel conduit sold by it of a transportation charge less than the actual cost of transportation of such conduit does not give rise to discrimination in price within the prohibition of Section 2 of the Clayton Act, as amended, or otherwise, in any case in which the delivered price of such conduit is not less than the delivered price at which rigid steel conduit of like grade and quality is sold by said respondent to other purchasers, or in any case in which the delivered price of such conduit is not less than the delivered price at which rigid steel conduit of like grade and quality is sold by other producers of rigid steel conduit to the same purchaser or to other purchasers similarly located.

(l) For the additional reasons stated in the foregoing subparagraphs (j) and (k) and to that extent, the prohibition of said subparagraph (c) of Paragraph V of the Order is additionally arbitrary and without basis in law.

10. The Commission exceeded its powers in ordering in Paragraph V of the Order that said respondents, their respective officers, representatives, agents and employees, in or in connection with the offering for sale, sale and distribution of rigid steel conduit in such commerce, cease and desist from doing the things set out in subparagraph (d) thereof, namely, "Discriminating among purchasers by quoting or selling rigid steel conduit at prices which systematically differ in terms of mill nets according
516 to the location of the purchasers, and which mill nets plus common carrier transportation charges to the respective locations of such purchasers, produce delivered costs identical with those to such purchasers from differently located respondents", for the same respective reasons as those stated in subparagraphs (a) to (i), inclusive, of paragraph 7 of this Statement relative to subparagraph (a) of Paragraph V of the Order, and for the following additional reason:

(j) Said subparagraph (d) is so vague, indefinite and ambiguous that it does not provide or constitute a standard by which said respondents, or any of them, can reasonably be expected to be governed in the conduct of their respective affairs or to shape the conduct thereof, and for that additional reason and to that extent the prohibition of said subparagraph (d) is additionally arbitrary and without basis in law.

II.

The Commission erred in its Findings as to the Facts and Conclusions in the following respects:

1. The Commission has failed to indicate in its Findings as to the Facts (hereinafter sometimes called the Findings or the Findings of Fact) which of the petitioners herein were found by the Commission, on the basis of evidence, to be connected with the respective matters set forth in the Findings, but has made the Findings with
517 reference to the respective petitioners herein by applying to them and to other respondents in the proceeding before the Commission the general term "respondent conduit sellers" to connect all or some of the petitioners with matters referred to in a particular finding, without any finding to designate which, if any, of the petitioners herein were actually connected with or took part in, or were claimed to be connected with or to have taken part in, said matters, and without support in the evidence for such findings as against all the petitioners.

2. The Commission erred in subparagraph (1) of Paragraph One of the Findings in finding, relative to the petitioner (respondent before the Commission) Clayton Mark & Company, that it succeeded the Mark Manufacturing Company and, further, that said Mark Manufacturing Company was purchased by the petitioner (respondent before the Commission) Youngstown Sheet & Tube Company, and, further, that said Clayton Mark & Company was a member of Rigid Steel Conduit Association (hereinafter referred to as RSCA) and participated in its affairs from its organization until its dissolution.

3. The Commission erred in subparagraph (r) of Paragraph One of the Findings in finding, relative to the petitioner (respondent before the Commission) Laclede Steel Company, that said Company, although not found

by the Commission to have been at any time a member of RSCA, participated in carrying on the association
518 activities and continued to cooperate with RSCA and its members until that association was dissolved.

4. The Commission erred in paragraph (w) of Paragraph One of the Findings in finding, relative to the petitioner (respondent before the Commission) The Youngstown Sheet & Tube Company, that said Company participated in the affairs of RSCA until May, 1938, or until any time subsequent to July, 1936; and, further, that subsequent to the resignation of said Company from RSCA in 1936 its representatives attended Association meetings and served as members of Association committees, and that said Company participated in the activities of RSCA at times when said Company was not a member thereof.

5. The Commission erred in subparagraph (z) of Paragraph One of the Findings in finding, relative to the petitioner (respondent before the Commission) Republic Steel Corporation, that through membership of Fretz-Moon Tube Company, Inc. in RSCA, and through the activities of Steel and Tubes, Inc. and those of its own Steel and Tubes Division, Republic Steel Corporation has at any time cooperated with or assisted in the activities of RSCA and its members.

6. The Commission erred in finding in subparagraph (1-d) of Paragraph One of the Findings, relative to the respondent before the Commission, Frank C. Hodkinson, that during the period of the Code approved under the National Industrial Recovery Act for the electrical
519 manufacturing industry, he was appointed by the Board of Governors of the National Electrical Manufacturers Association as the supervisory agency for the Roughing-in Classification of that industry for the administration of said Code as it applied to rigid steel conduit and other products included in the roughing-in classification, whereas the evidence shows that he was appointed such supervisory agency by the National Recovery Administration and the President of the United States in conformity with the provisions of said National Industrial Recovery Act.

7. The Commission erred in finding in subparagraph (c) of Paragraph Two of the Findings, relative to the respondents with reference to whom the finding in said subparagraph was made that they and each of them had directed, cooperated with, or assisted the petitioners herein

and/or other conduit sellers* in planning and executing the various policies, practices and methods subsequently set forth in the Findings.

8. The Commission erred in subparagraph (a) of Paragraph Four of the Findings, in finding that "Several" of the pioneer producers of conduit** were merely agents
520 of steel companies for the purpose of converting pipe into conduit and distributing it, whereas the evidence shows only that two of the early producers of conduit were agents for that purpose of one steel company.

9. The Commission erred in subparagraph (b) of Paragraph Four of the Findings in finding, relative to the petitioners herein and/or other producers of conduit, that a formula was used which provided that at any given location the delivered price quotation of a conduit seller should be based upon Pittsburgh or Evanston, depending upon which base price and accompanying discount produced the lower figure at the purchaser's destination, if by that finding it was intended that it should be understood that such formula was used by agreement among the petitioners, or any of them.

10. The Commission erred in finding in subparagraph (c) of Paragraph Four of the Findings, relative to the petitioners herein and/or other conduit sellers, that they followed or used the list-and-discount method of determining delivered prices which is described in the previous part of the Findings "pursuant to their basing-point system" during any period of time, and also in finding further that in June, 1930, or at any other time, "certain alterations cooperatively determined upon" were made in the method of calculating their delivered prices of conduit.

11. The Commission erred in subparagraph (a) of
521 Paragraph Five of the Findings in finding that conduit sellers, including the petitioners herein, established and maintained, or established or maintained, through collective action, a basing-point, delivered-price system either in its present form or any other form and that they, either in so doing or otherwise, had the purpose of limiting and

* The term "conduit sellers" is used in this Statement of Points with the same meaning as that in which it is used in the findings, namely, to indicate those of the respondents before the Commission that are named in subparagraphs (k) to (1-b), inclusive, of Paragraph One of the Findings.

** The term "conduit," when used without other designation in this Statement of Points, means rigid steel conduit.

restraining the normal forces of competition. The Commission erred further in said subparagraph (a) in finding that said conduit sellers, including the petitioners herein, in the establishment and maintenance of the basing-point, delivered-price system, recognized that by virtue of location some conduit sellers could, by reflecting advantage of location in their prices, exclude others from selling in certain markets. The Commission erred further in said subparagraph in finding relative to said conduit sellers, including the petitioners herein, that in the establishment and maintenance of the basing-point, delivered-price system, said conduit sellers or any of them recognized that in order to maintain a price level high enough to permit each seller to sell in the natural territories of other conduit sellers, price competition must be restrained. The Commission erred further in said subparagraph in finding that examples of the knowledge and purpose as aforesaid of the respondent conduit sellers, including the petitioners herein, appear in the record in various ways.

12. The Commission erred in subparagraph (b) of Paragraph Five of the Findings in finding that F. C. Hodkinson, a respondent before the Commission, was appointed
522 by the Board of directors of the National Electrical Manufacturers Association as the supervisory agency for the division of the electrical manufacturing industry which included conduit, whereas, as stated above, the evidence shows that he was appointed such supervisory agency by the National Recovery Administration and the President of the United States in conformity with the provisions of the National Industrial Recovery Act.

13. The Commission erred in subparagraph (a) of Paragraph Six of the Findings in finding that mistakes by conduit sellers in the selection of the railroad tariff rate to be used in a particular instance were a fruitful source of differences in the delivered prices quoted by them.

14. The Commission erred in subparagraph (b) of Paragraph Six of the Findings in making an utterly unjustified and insinuating finding as follows:

"The record does not disclose the details of various steps taken by the respondent conduit sellers with respect to railroad tariff rates prior to 1936,"

and in impliedly finding thereby that steps were taken by the respondent conduit sellers with respect to railroad tariff rates; and further in finding that "apparently"

freight rates derived from a freight rate bulletin on standard pipe prepared by National Tube Company were used generally by conduit sellers and that no freight bulletin on conduit was published (meaning apparently published by any conduit seller or conduit sellers) until some
523 time after the organization of RSCA.

15. The Commission erred in subparagraph (c) of Paragraph Six of the Findings in finding that some time prior to September 10, 1936, RSCA began the publication of freight rate bulletins "for the common use of respondent conduit sellers," whereas there is no support in the record for such finding relative to the respective petitioners, Clayton Mark & Company, Laclede Steel Company, Republic Steel Corporation and The Youngstown Sheet and Tube Company.

16. The Commission erred in Paragraph Seven of the Findings in finding that Herbert S. Blake, either in collaboration with RSCA or otherwise, undertook the formulation and execution of plans having the fundamental purpose of controlling certain conditions which tended to interfere with and disturbed the operation of the basing-point, delivered-price system in producing matched price quotations and prices to conduit purchasers.

17. The Commission further erred in Paragraph Seven of the Findings in finding, relative to the respective petitioners herein, that the Robinson-Patman Act was viewed by them as a grant of authority for collective action to prevent any departure from uniformity in prices, discounts, terms of sale, and merchandising policies.

18. The Commission further erred in Paragraph
524 Seven of the Findings in finding, relative to the respective petitioners herein, that the use of consignment contracts, protection contracts and other means to control distributors and prices, the investigation and control of specific building contracts, so-called closed transaction inquiries, elimination of warehouses, uniformity of trade discounts, and classification of purchasers, or any of said subjects, were subjects of, or that any of said subjects was the subject of, collective action, either promoted by said Herbert S. Blake and RSCA, or otherwise.

19. The Commission erred in subparagraph (b) of Paragraph Eight of the Findings, in so far as the findings therein are intended to have reference to the petitioner Clayton Mark & Company, or to the petitioner, Laclede

Steel Company, or to the petitioner Republic Steel Corporation, or to the petitioner The Youngstown Sheet & Tube Company, in finding that any plan was engaged in by RSCA under the leadership of said Herbert S. Blake to stabilize the price structure in the conduit industry through the general use of consignment contracts which were to be made uniform and enforced according to their terms, and also erred in failing to find that at the times referred to in said subparagraph (b), none of said petitioners Laclede Steel Company, Republic Steel Corporation and The Youngstown Sheet & Tube Company was a member of RSCA, and, as to them and said petitioner Clayton Mark & Company, that none of them had any part in the preparation of any form of uniform consignment contract or of any draft of any form of any such
525 a contract or used any form of consignment contract prepared by RSCA and said Herbert S. Blake, or by either of them, or in any way modified their respective methods of selling rigid steel conduit by the adoption or use of any form of consignment contract.

20. The Commission erred in subparagraph (e) of Paragraph Eight of the Findings in finding, relative to the respective petitioners herein, that, after the adoption of uniform consignment contracts, a step or steps were taken to secure maintenance of prices according to any basing-point, delivered-price formula under any form of consignment contract and that various forms of pressure were exerted upon both conduit sellers and conduit wholesalers to that end.

21. The Commission erred in subparagraph (d) of Paragraph Nine of the Findings in finding, relative to the petitioners Clayton Mark & Company, Laclede Steel Company, Republic Steel Corporation and The Youngstown Sheet & Tube Company, respectively, that the conduit sellers sent lists of their respective specific building contracts to Organization Service Corporation and thereafter sent copies of new contracts of that nature from time to time as they were negotiated, and further erred in finding, relative to said petitioners, or any of them, that forms were supplied to conduit sellers for the initial reporting of their respective specific building contracts, and further
526 erred in finding, in so far as the finding is intended to have reference to said petitioners, or any of them, that

each seller bore the cost of investigation of contracts reported by such conduit seller.

22. The Commission erred in subparagraph (a) of Paragraph Ten of the Findings in finding, relative to the petitioners Clayton Mark & Company, Laclede Steel Company, Republic Steel Corporation and The Youngstown Sheet & Tube Company, respectively, that the amounts and terms of trade discounts to be granted by conduit sellers was the subject of collective consideration by them and conduit wholesalers.

23. The Commission erred in subparagraph (c) of Paragraph Ten of the Findings in finding, relative to the petitioners Laclede Steel Company, Republic Steel Corporation and The Youngstown Sheet & Tube Company, respectively, that in February, 1937, or at any other time, conduit sellers issued their price cards numbered 75 in which changes were made in the manner of their quoting prices for rigid steel conduit, and in which increased prices were quoted for less than carload lots thereof, and in which trade discounts or agent's compensation provided by "each conduit seller" by said respective cards No. 75 differed from those previously in effect.

24. The Commission erred in subparagraph (a) of Paragraph Eleven of the Findings in finding, relative to the
527 respective petitioners herein, that any step was taken in any plan to which any of said petitioners was a party "for maintaining price uniformity in accord with the pricing plan used in quoting conduit prices."

25. The Commission erred in subparagraph (c) of Paragraph Eleven of the Findings in finding, relative to the respective petitioners herein (referred to in said paragraph as "Respondent conduit sellers"), that they have contended that the investigations referred to in said subparagraph (c) constituted proper activity necessary to enable sellers to secure information as to the condition of the conduit market, whereas in conception and execution, as the Commission found, such investigations amounted to a sophisticated form of price maintenance through united action.

26. The Commission erred in Paragraph Twelve of the Findings in finding, relative to the respective petitioners herein, that conduit sellers supplemented the restraining effects of their general practices affecting prices by any of the actions referred to in said Paragraph as being "more

direct" and that the scope and nature of the activities referred to are indicated by exhibits in the record; and the Commission further erred in said Paragraph Twelve in finding, relative to the respective petitioners herein, that
the contract checking and "closed transaction" in-
528 quiries therein referred to were closely interwoven
with other price maintenance activities.

27. The Commission erred in Paragraph Fourteen of the Findings in finding, relative to the respective petitioners herein, that by means of collective action, conduit sellers discontinued the maintenance of warehouse stocks except on the Pacific Coast.

28. The Commission erred in subparagraph (a) of Paragraph Fifteen of the Findings in finding, relative to the respective petitioners herein, that through the use of the basing-point delivered-price formula, whether with or without the use of common delivery charge factors and common freight rate books, respondent conduit sellers have been able to achieve a substantial degree of delivered price identity in quoting and selling conduit, in that the implication in said finding that there was a design on the part of said respective petitioners to achieve that result is without support in the record herein. The Commission further erred in said subparagraph (a) in finding, by implication, relative to the respective petitioners herein, that the use of common delivery charge factors and common freight rate books was designed to aid in reducing and eliminating price differences.

29. The Commission erred in subparagraph (b) of Paragraph Fifteen of the Findings in finding, relative to the
respective petitioners herein, that the pricing system
529 used by them, respectively, had an effect, whether substantial or otherwise, in securing and maintaining identity of delivered price quotations and prices in private sales.

30. The Commission erred in subparagraph (c) of Paragraph Sixteen of the Findings in finding, relative to the respective petitioners herein, as it has done at least by implication, that conduit sellers refuse to quote true f.o.b. mill prices.

31. The Commission erred in subparagraph (d) of Paragraph Sixteen of the Findings in finding, relative to the rigid steel conduit industry, that failure of prices to respond to changing conditions of supply and demand, both

locally and nationally, indicates the absence of effective competition.

32. The Commission erred in subparagraph (e) of Paragraph Sixteen of the Findings in finding that there are conduit sellers, respondents before the Commission, who actually distribute their products, or any of them, in sections and at locations in the United States where other conduit sellers do not attempt to make sales.

33. If and to the extent that the term "discriminate among purchasers of conduit" is used therein to refer to such discrimination among purchasers as is made unlawful by Section 2 of the Clayton Act, as amended, the Commission erred in subparagraph (a) of Paragraph Seven-
530 teen of the Findings in finding that the use by conduit sellers of the pricing formula previously described in the Findings requires any such seller to discriminate among purchasers of conduit by charging some more than others for similar goods.

34. The Commission erred in subparagraph (b) of Paragraph Seventeen of the Findings in finding that in each quotation of a price to purchasers located in his home town and at other points where he has a freight advantage as compared with mills located at the controlling basing-point, a conduit seller increases his mill net or real price by the amount necessary to produce a quotation equivalent to the sum of the controlling base price plus delivery charge factor from that base to the particular destination. The Commission erred further in said subparagraph (b) in finding therein, and in the next succeeding unlettered subparagraph, and in subparagraph (c) of Paragraph Seventeen of the Findings and in subparagraph (a) of Paragraph Eighteen of the Findings, that the "mill net" of a seller is his "real price", if and to the extent that said latter term is used, or intended to be used, in any legal sense.

35. The Commission erred in subparagraph (d) of Paragraph Seventeen of the Findings in finding that the pricing pattern therein referred to amounts to each seller inviting other sellers to share in the available business in his
531 freight-advantage territory in return for any privilege, or otherwise, and in finding that such pricing pattern requires the maintenance of a higher price level than would otherwise be necessary, either for the purposes stated in said subparagraph or for either of them, or for any other purpose, and in finding further that by denying to some

purchasers the advantages of their location with respect to points at which conduit is produced, sellers of conduit are enabled to subsidize their own sales to other purchasers who are not so favorably located.

36. The Commission erred in subparagraph (a) of Paragraph Eighteen of the Findings in finding that each conduit seller knows that by use of the basing-point, delivered-price formula, each such seller will be able to quote a price at any given destination identical with the prices quoted by others pursuant to such formula, and that thus all users of the formula will be enabled to present to a prospective purchaser a condition of matched prices in which such purchaser is isolated and deprived of any choice on the basis of price.

37. The Commission erred further in said subparagraph (a) of Paragraph Eighteen of the Findings in finding that systematic price variations according to the pattern described in said subparagraph (a) do not represent competition in the ordinary meaning of that term, and in finding further that each participant in the use of the
532 pricing formula referred to in said subparagraph consciously intends that no attempt be made to exclude any seller from the natural freight-advantage territory of another and by the use of such formula in effect invites others to share in the available business in his natural market in return for a reciprocal invitation, or otherwise.

38. The Commission erred in subparagraph (b) of Paragraph Eighteen of the Findings in finding, within any meaning of the terms used therein that is recognized in the law, or within any legal significance of said terms, that the basing-point, delivered-price formula therein referred to is a pricing system recognized by economists as a controlled price or monopolistic price system; that it does not, in its operations or results, conform to the recognized economic principles which indicate the existence of free and effective competition; that one of the characteristics of effective competition in the sale of rigid steel conduit is that the prices thereof readily respond to changing conditions in supply and demand; that the respondents' system of pricing and selling has produced a high degree of price rigidity and at times prices have moved contrary to what would be expected in a market amenable to the law of supply and demand; that the use of such formula produces a condition of mutual dumping inconsistent with the

existence of effective competition; that there is a sys-
533 tematic pattern of discriminations among purchasers of conduit which would not exist concurrently with effective competition; and that the use of such formula indicates the absence of effective competition.

39. The Commission erred in subparagraph (c) of Paragraph Eighteen of the Findings in finding (1) that the economic principle that in a truly competitive market the unit price of a homogeneous commodity tends to become approximately uniform does not serve to explain the results of the use of the pricing formula referred to in said subparagraph (c); (2) that in the purchase and sale of units of a homogeneous commodity in such a market, sellers are indifferent as to whose money they get for their commodity and buyers are indifferent as to whose commodity they get for their money; (3) that a violation of what is recognized by some economists as "the principle of indifference" is, in any legal sense, inconsistent with a tendency toward price uniformity in such a market; and (4) that uniformity of price quotations amounts to a violation of any law.

40. The Commission erred in subparagraph (a) of Paragraph Nineteen of the Findings in making each of the conclusions and findings as follows: (a) that the capacity, tendency and effect, or the capacity, or tendency or effect, of the combination and conspiracy found (without supporting evidence) by the Commission to have been maintained by respondents named in Count I of the complaint or
534 any two or more of them, or any acts and/or practices performed thereunder, or in connection therewith, by said respondents or any of them, has been or is to hinder, lessen, restrain, or suppress competition in the sale and distribution of conduit; (b) that the capacity, tendency and effect, or the capacity, or tendency or effect, of the combination and conspiracy found (without supporting evidence) by the Commission to have been maintained by said respondents is to deprive purchasers of conduit of the benefits of competition in price; (c) that the capacity, tendency and effect or the capacity, or tendency or effect, of the combination and conspiracy found (without support-

ing evidence) by the Commission to have been maintained by said respondents is, in any legal sense, to maintain artificial and monopolistic methods and prices in the sale and distribution of conduit; (d) that the capacity, tendency and effect, or the capacity, or tendency or effect, of the combination and conspiracy found (without supporting evidence) by the Commission to have been maintained by said respondents is to classify purchasers of conduit and determine the treatment to be accorded to such purchasers; (e). that the capacity, tendency and effect, or the capacity, or tendency or effect, of the combination and conspiracy found (without supporting evidence) by the Commission to have been maintained by said respondents is to
535 establish and maintain uniform discounts, terms and conditions of sale for the sale of conduit; (f) that the capacity, tendency and effect, or the capacity, or tendency or effect, of the combination and conspiracy found (without supporting evidence) by the Commission to have been maintained by said respondents is to determine and control the use of warehouses in the distribution of conduit; (g) that the capacity, tendency and effect, or the capacity, or tendency or effect, of the combination and conspiracy found (without supporting evidence) by the Commission to have been maintained by said respondents is to prepare, adopt and use, or to prepare, or adopt or use, for the purpose of aiding in price maintenance and control, uniform contracts for distributors and for contractors buying for specific projects, or for either distributors or such contractors, and to enforce the terms of such contracts through investigations and reports thereon; (h) that the capacity, tendency and effect, or the capacity, or tendency or effect, of the combination and conspiracy found (without supporting evidence) by the Commission to have been maintained by said respondents is to support and maintain their price structure through the conduct of investigations of sales and offers to sell and the circulation of reports thereon; and (i) that the capacity, tendency and effect, or the capacity, or tendency or effect, of the combination and conspiracy found (without supporting evidence) by
536 the Commission to have been maintained by said re-

spondents is in any other manner to maintain and promote, or to maintain or promote, the purposes of a combination and conspiracy, or of a combination or conspiracy, to hinder, lessen and restrain, or to hinder or lessen or restrain, competition in the sale and distribution of conduit.

41. The Commission erred in subparagraph (b) of Paragraph Nineteen of the Findings in making each of the conclusions and findings as follows: (a) that the capacity, tendency and effect, or the capacity, or tendency or effect, of the use by each respondent named in count II of the Commission's complaint of the basing-point, delivered-price formula to determine price quotations and prices which will be made to conduit purchasers at any given destination concurrently with similar use of the same pricing formula by other of said respondents have been and is, or have been or is, to hinder, lessen and restrain or to hinder, or lessen or restrain competition in price in the sale and distribution of conduit; (b) that the capacity, tendency and effect, or the capacity, or tendency or effect, of the use by each such respondent of such formula to determine such price quotations and prices concurrently with similar use of the same pricing formula by other of said respondents have been and is, or have been or is, to deprive
537 purchasers of the benefits of competition in price; (c) that the capacity, tendency and effect, or the capacity, or tendency or effect, of the use by each such respondent of such formula to determine such price quotations and prices concurrently with similar use of the same pricing formula by other of said respondents have been and is, or have been or is, unfairly to discriminate among purchasers; and (d) that the capacity, tendency and effect, or the capacity, or tendency or effect, of the use by each such respondent of such formula to determine such price quotations and prices concurrently with similar use of the same pricing formula by other of said respondents have been and is, or have been or is, to create in each of said respondents a dangerous tendency toward a monopolistic control over price in the sale and distribution of conduit.

42. The Commission erred in its Conclusion in holding

that acts and practices of respondents constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Dated June 18, 1945.

Respectfully submitted,

Cravath, Swaine & Moore
By Hoyt H. Moore,
A Member of the Firm,
Attorneys for Petitioners in Case No. 8642,
15 Broad Street,
New York 5, N. Y.

Ferris E. Hurd,
Counsel for said Petitioners,
120 South La Salle Street,
Chicago 3, Illinois.

Service accepted this June 20, 1945.

W. T. Kelley,
Chief Counsel.

539 In the

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

* * (Caption—8642) * *

STATEMENT OF ADDITIONAL POINTS UPON WHICH THE PETITIONER LACLEDE STEEL COMPANY INTENDS TO RELY.

(Filed June 22, 1945. Kenneth J. Carrick, Clerk.)

To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Comes now Laclede Steel Company, a Petitioner herein, and shows to the Court that it has filed herein in conjunction with other Petitioners, a Statement of Points upon which it intends to rely, and this Petitioner now makes and files this, its Statement of Additional Points upon which it intends to rely in this review, as follows:

I.

(1) The Commission exceeded its power in ordering, in that Paragraph of the Order (which is hereinafter referred to as Paragraph I of the Order), which begins with the words, "It is ordered", that this Petitioner
540 cease and desist from doing or performing any of the things set forth in Sub-paragraphs 1 to 9 inclusive of Paragraph I of the Order, because there is no substantial evidence in the record herein that this Petitioner at any time did any of the things set forth in said Paragraph I of the Order, or any similar or other thing which would afford any basis for the issuance of such order against this Petitioner.

(2) The Commission exceeded its powers in ordering, in Paragraph I of the Order, that this Petitioner cease and desist from doing or performing any of the things set out in Sub-paragraph 2 thereof, because there is no substantial evidence that this Petitioner at any time did any of the things in said Sub-paragraph 2 of the Order, or any similar or other things which would afford any basis for the issuance of such order against this Petitioner.

(3) The Commission exceeded its powers in ordering, in Paragraph I of the Order, that this Petitioner cease and desist from doing or performing any of the things set out in Sub-paragraph 3 thereof, because there is no substantial evidence that this Petitioner at any time did any of the things in said Sub-paragraph 3 of the Order, or any similar or other thing which would afford any basis for the issuance of such order against this Petitioner.

(4) The Commission exceeded its powers in ordering, in Paragraph I of the Order, that this Petitioner cease and desist from doing or performing any of the things set out in Sub-paragraph 4 thereof, because there is no substantial evidence that this Petitioner at any time did any of the things in said Sub-paragraph 4 of the Order, or any similar or other thing which would afford any basis for the issuance of such order against this Petitioner.

541 (5) The Commission exceeded its powers in ordering, in Paragraph I of the Order, that this Petitioner cease and desist from doing or performing any of the things set out in Sub-paragraph 5 thereof, because there is no substantial evidence that this Petitioner at any time did any of the things in said Sub-paragraph 5 of the Order, or any similar or other thing which would afford

any basis for the issuance of such order against this Petitioner.

(6) The Commission exceeded its powers in ordering, in Paragraph I of the Order, that this Petitioner cease and desist from doing or performing any of the things set out in Sub-paragraph 6 thereof, because there is no substantial evidence that this Petitioner at any time did any of the things in said Sub-paragraph 6 of the Order, or any similar or other thing which would afford any basis for the issuance of such order against this Petitioner.

(7) The Commission exceeded its powers in ordering, in Paragraph I of the Order, that this Petitioner cease and desist from doing or performing any of the things set out in Sub-paragraph 7 thereof, because there is no substantial evidence that this Petitioner at any time did any of the things in said Sub-paragraph 7 of the Order, or any similar or other thing which would afford any basis for the issuance of such order against this Petitioner.

(8) The Commission exceeded its powers in ordering, in Paragraph I of the Order, that this Petitioner cease and desist from doing or performing any of the things set out in Sub-paragraph 8 thereof, because there is no substantial evidence that this Petitioner at any time did any of the things in said Sub-paragraph 8 of the Order, or any similar or other thing which would afford any basis for the issuance of such order against this Petitioner.

542

II.

The Commission erred in its Findings as to the Facts and Conclusions in the following respects:

(1) The Commission erred in Sub-paragraph (b) of Paragraph Five of the Findings in failing to find that at the times referred to in said Sub-paragraph (b) this Petitioner, Laclede Steel Company, was not engaged in the conduit business prior to and during the N.R.A. code period, and by reason of the failure of the Commission to make a specific finding that the statements contained in said Sub-paragraph (b) do not apply to this Petitioner.

(2) The Commission erred in Sub-paragraph (e) of Paragraph Six in failing to find that this Petitioner, Laclede Steel Company, did not at any time use the Donley Bulletins in figuring delivered price quotations.

(3) The Commission erred in Sub-paragraph (f) of Paragraph Six in failing to find that this Petitioner,

BLEED THROUGH = POOR COPY

Laclede Steel Company, did not at any time use the Donley Bulletins in figuring delivered price quotations.

(4) The Commission erred in Paragraph Seven of the Findings in failing to find that this Petitioner, Laclede Steel Company, did not at any time participate in "the investigation and control of specific building contracts, so-called closed transaction inquiries, elimination of warehouses, uniformity of trade discounts, and classification of purchasers".

(5) The Commission erred in Sub-paragraph (a), (b) and (c) of Paragraph Nine of the Findings in failing to find that this Petitioner, Laclede Steel Company, did not adopt or at any time use any form of specific building contract.

543 (6) The Commission erred in Sub-paragraph (a) of Paragraph Eleven of the Findings in failing to find that this Petitioner, Laclede Steel Company, did not at any time participate in any so-called "closed transaction" investigations.

(7) The Commission erred in Paragraph Twelve of the Findings in failing to find that this Petitioner, Laclede Steel Company, did not at any time participate in any "contract checking and 'closed transaction' inquiries carried on by RSCA through OSC and Robert S. Booth".

(8) The Commission erred in Sub-paragraph (b) of Paragraph Fifteen of the Findings in failing to find that during the period from January 1, 1937 to January 24, 1941, inclusive, 65.8% of all sales of conduit by this Petitioner were sold at less than the card price.

This Petitioner intends to rely in this review upon the "Statement of Points Upon Which the Petitioners Intend to Rely" filed herein in conjunction with other Petitioners, and in addition thereto the points set forth in this its Statement of Additional Points upon which it intends to rely.

Respectfully submitted,

Milton H. Tucker,
208 North Broadway,
St. Louis, Missouri,
Attorney for Petitioner Laclede Steel Company.

Ferris E. Hurd,
120 South LaSalle St.,
Chicago 3, Illinois,
Counsel for said Petitioner.

545 In the

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

General Electric Company and General Electric Supply Corporation,
Petitioners,
against
Federal Trade Commission,
Respondent.
} No. 8644

546 PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed July 28, 1944. Kenneth J. Carrick, Clerk.)

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now come your petitioners General Electric Company and General Electric Supply Corporation, by their attorneys, and jointly and severally present their petition to review and set aside the order of the Federal Trade Commission (hereinafter referred to as the "Commission"), made and entered on June 6, 1944, and in support thereof respectfully state and show:

1. General Electric Company is a corporation duly organized and existing under the laws of the State of New York and has its principal office and place of business in the City of Schenectady, State of New York.

2. General Electric Supply Corporation is a corporation duly organized and existing under the laws of the State of Delaware, is a wholly owned subsidiary of
547 General Electric Company and has its principal office and place of business in the City of Bridgeport, State of Connecticut.

Nature of the Proceeding.

3. Under date of January 25, 1941 the Commission made and issued its complaint in a proceeding entitled "In the Matter of Rigid Steel Conduit Association, *et al.*", Docket No. 4452, charging petitioners and the other re-

spondents named therein with unfair methods of competition in the sale and distribution of rigid steel conduit in interstate commerce and in the District of Columbia in violation of Section 5 of the Federal Trade Commission Act (United States Code, Title 15, Section 45). The respondents named in such order are seventy-four (74) in number and consist of (a) Rigid Steel Conduit Association, an unincorporated trade association, and ten individuals named as its officers and directors, (b) Organization Service Corporation and six individuals named as its officers, (c) nineteen corporations and one partnership of four individuals named as manufacturers or "sellers" of rigid steel conduit, (d) National Electrical Wholesalers Association and seventeen individuals named as its officers and members of its conduit committee, (e) thirteen corporations named as members of the National Electrical Wholesalers Association and (f) two individuals. General Electric Company is named as a conduit manufacturer or "seller" and General Electric Supply Corporation as both a manufacturer and a member of National Electric Wholesalers Association.

Count I of the Complaint.

4. The Commission's complaint contains two counts based upon different allegations and different legal
548 theories. Count I, based upon charges of conspiracy, alleges that for "more than six years last past" respondents

"have entered into, and thereafter engaged in and carried out, and are still engaged in and carrying out, a wrongful and unlawful understanding, agreement, combination and conspiracy, for the purpose and with the effect of substantially restricting, suppressing, eliminating and frustrating actual and potential competition as to price, and otherwise, in the sale and distribution of 'conduit' in trade and commerce between and among the various States of the United States and in the District of Columbia."

5. Count I then alleges that pursuant to said conspiracy petitioners and their co-respondents agreed and did:

adopt, maintain and use a basing-point-delivered-price method of quoting prices on and selling conduit which divides the United States into so-called Pittsburgh and

Chicago basing point areas, produces uniform price quotations at any given destination in either of such areas, and prevents the reflection of differences in the cost of freight between places of manufacture and locations of purchasers; adopt, maintain and use, with the assistance of respondent Charles Donley, a cooperative system of preparing and circulating a compilation of common freight factors or "adders" for use in connection with such basing-point-delivered-price method; prepare and use, with the assistance of Organization Service Corporation and Herbert S. Blake, uniform terms and conditions of sale incorporated in certain agreements, uniform price quotation sheets and uniform business practices, and a method or system of espionage or investigation of certain contracts; adhere to announced prices, terms and conditions of sale until other prices, terms and conditions of sale were quoted 549 and published; cooperate in defining what constitutes a "recognized" jobber or dealer and circulate lists of "recognized" jobbers and dealers; adopt uniform discounts to be allowed to dealers, jobbers, wholesalers or agents; use retaliatory pricing action to require sellers and distributors to conform to respondents' agreements; and participate in meetings under the auspices of Organization Service Corporation, Rigid Steel Conduit Association, National Electrical Wholesalers Association in the course of which said Corporation, said Associations and Charles Donley assisted respondent "sellers" in furthering and carrying out the alleged practices.

6. Count I concludes by alleging that such acts and practices are to the prejudice of competitors of respondent "sellers" and "wholesalers" and have a tendency to and do hinder competition, unreasonably restrain commerce, create monopoly, and constitute unfair methods of competition.

Count II of the Complaint.

7. Count II consists of an attack upon the basing-point method of quoting prices on and selling conduit independent of any collusion or conspiracy. Thus Count II alleges that each of the twenty (20) conduit "sellers" named therein, with the knowledge that all of the others do likewise, generally refrains from quoting f. o. b. its place of production or shipment and, instead, quotes delivered prices made up of a basing point price plus an amount equal

to the freight from such basing point to the place of delivery, irrespective of whether shipment is to be made from such basing point or some other location, and that the use of such method by respondents results in uniform delivered price quotations. It is charged that each
550 such "seller" systematically demands and receives as an incident to the aforesaid method larger sums for products of equal quantity and quality from customers located at or near its place of business and manufacture than from customers located at greater distances, thereby depriving such nearby customers of price advantages which they would naturally enjoy by reason of their proximity to such point of production.

8. Count II concludes by alleging that the use by respondent "sellers" of the basing-point method as therein alleged is to the prejudice of the public, has a tendency to and does hinder competition, unreasonably restrains commerce, creates monopoly, causes substantial unfair and discriminatory treatment among customers and, therefore, constitutes an unfair method of competition.

Answers of Petitioners.

9. Under date of April 11, 1941 petitioners filed their answers to the complaint denying all charges of improper acts and practices and of unfair methods of competition therein contained. Both of such answers deny that General Electric Supply Corporation is a conduit manufacturer or "seller." The answer of General Electric Company admits that such Company generally, but not exclusively, sells conduit at delivered prices and that such prices are based on its price at Pittsburgh or Chicago, whichever is more favorable to the customer, plus the amount of the freight from such point to the point of delivery.

The Hearings.

10. Commencing on September 15, 1941 and terminating on March 31, 1942, hearings were had before a
551 Trial Examiner designated by the Commission in the course of which evidence, both oral and documentary, was adduced in behalf of the Commission and in behalf of respondents.

11. Thereafter and under date of July 23, 1942, the

Trial Examiner made his report upon the evidence. Exceptions to such report and briefs were filed by counsel for petitioners and other respondents and by counsel for the Commission. Oral argument was had before the Commission on May 11, 12 and 13, 1943.

The Order to Be Reviewed.

12. On June 6, 1944 the Commission made and served its "Findings as to the Facts and Conclusion" and its "Order To Cease and Desist," sustaining the charges of Count I of the complaint against all respondents, except ten hereinafter mentioned, and the charges of Count II against all of the conduit "sellers" therein named, except five hereinafter mentioned. Copies of such "Findings as to the Facts and Conclusion" and "Order To Cease and Desist" are attached hereto as Exhibit A and Exhibit B, respectively, and made a part hereof and reference thereto is hereby made for the exact terms thereof.

13. With respect to the charges of Count I of the complaint, the first paragraph of the Order following the preamble therein orders petitioners and their co-respondents (except as aforesaid) and their respective officers, representatives, agents and employees,

"in or in connection with the offering for sale, sale, and distribution of rigid steel conduit in commerce, as 'commerce' is defined in the Federal Trade Commission Act,"

552 forthwith to cease and desist from entering into, continuing, cooperating in, or carrying out

"any planned common course of action, understanding, agreement, combination or conspiracy"

between any two or more of such respondents or between any one or more of them and others not parties to the proceeding, to do or perform any of the following:

"1. Quoting or selling rigid steel conduit at prices calculated or determined pursuant to or in accordance with the basing-point, delivered-price system; or quoting or selling rigid steel conduit at prices calculated or determined pursuant to or in accordance with any other plan, system, or formula which produces identical price quotations or prices for rigid steel conduit by respondents using such plan, system, or formula at points of quotation or sale, or to particular purchases, or which prevents purchasers from

finding any advantage in price in dealing with one or more of the respondents as against any of the other respondents.

"2. Establishing, fixing, or maintaining prices, terms, or conditions of sale for rigid steel conduit, or adhering to any prices, terms, or conditions of sale so fixed or maintained.

"3. Collecting, compiling, circulating, or exchanging information concerning common carrier transportation charges used or to be used as a factor in computing the price of rigid steel conduit; or using, directly or indirectly, any such information so collected, compiled, or received as a factor in computing the price of rigid steel conduit.

"4. Collecting, compiling, circulating, or exchanging 'freight adders,' delivery charge booklets, or other information concerning delivery charges on rigid steel conduit used or to be used as a factor in computing the price of
553 such conduit; or using, directly or indirectly, any such information so collected, compiled, or received as a factor in computing the price of rigid steel conduit.

"5. Circulating or exchanging information concerning the classification granted or to be granted to any specific purchaser of rigid steel conduit; or determining upon any basis for the selection or classification of customers, or using any basis so determined for selecting or classifying customers.

"6. Determining upon the location, establishment, maintenance, or discontinuance of warehouses or other places for the stocking of supplies of rigid steel conduit.

"7. Formulating or adopting consigned stock, specific building, or any other forms of contracts or agreements concerning the sale or distribution of rigid steel conduit, or using any contracts or agreements so formulated or adopted, for the purpose or with the effect of aiding or assisting in arriving at or maintaining uniform prices, terms or conditions in the sale or distribution of such conduit.

"8. Directly or indirectly investigating or checking the prices, quantities, terms, or conditions of any sale or offer to sell rigid steel conduit to any buyer or prospective buyer for the purpose or with the effect of aiding or assisting in maintaining uniform prices, terms, or conditions in the sale of such conduit.

"9. Doing or causing any of the things forbidden in the preceding paragraphs of this order to be done through

respondents Charles Donley, Herbert S. Blake, Organization Service Corporation, or any other individual, corporation, or organization."

The Order directs respondent Charles Donley, his representatives, agents and employees, to cease and desist from knowingly assisting, advising or cooperating in doing any of the things forbidden by paragraph of the Order
554 numbered (3) above. The Order then directs respondent Herbert S. Blake, his representatives, agents and employees, and Organization Service Corporation, its officers, agents and employees, to cease and desist from advising, aiding, assisting or directing respondents in doing any of the things forbidden by paragraphs of the Order numbered (1) to (8), inclusive, above.

The succeeding paragraph orders National Electrical Wholesalers Association, its officers, the officers and members of its conduit committee and certain corporations and firms, including General Electric Supply Corporation, individually and as members of such Association, their officers, representatives, agents and employees, to "cease and desist from aiding, assisting, or cooperating in any manner" in doing any of the things forbidden by paragraphs of the Order numbered (1) to (8), inclusive, above.

14. With respect to the charges of Count II of the complaint, the Order directs General Electric Company and fourteen (14) other named conduit "sellers," their officers, representatives, agents and employees,

"in or in connection with the offering for sale, sale, and distribution of rigid steel conduit in commerce, as 'commerce' is defined in the Federal Trade Commission Act," forthwith to cease and desist from doing any of the following things

"for the purpose or with the effect of systematically matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill nets received on sales to different purchasers:

"(a) Quoting or selling rigid steel conduit at prices calculated or determined pursuant to, or in accordance
555 with, the basing-point, del [sic.] delivered-price system.

"(b) Quoting or selling rigid steel conduit at delivered prices calculated as, or systematically equivalent to, the sum of the price in effect at, plus a transportation charge factor from, any point other than the actual shipping point.

BLEED THROUGH – POOR COPY

"(c) Quoting or selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination.

"(d) Discriminating among purchasers by quoting or selling rigid steel conduit at prices which systematically differ in terms of mill nets according to the location of purchasers, and which mill nets, plus common carrier transportation charges to the respective locations of such purchasers, produce delivered costs identical with those to such purchasers from differently located respondents."

The Order dismisses the complaint as to Central Tube Company, Laclede Tube Company and Steel & Tubes, Inc., all of which are dissolved, Garland Manufacturing Company, which is in reorganization and under control of trustees and receivers, and F. C. Hodkinson, an individual. The Order dismisses Count I as to Clifton Conduit Company, a partnership of four individuals, and Spang Chalfant, Inc. and Count II as to General Electric Supply Corporation.

Venue.

15. The statutes under which this Court has jurisdiction and venue are Section 128 of the Judicial Code, as amended (Section 225, Title 28, United States Code), 556 and Section 5 of the Federal Trade Commission Act (Section 45, Title 15, United States Code). Said Section 128 of the Judicial Code, as amended, provides in subdivision (e) thereof:

"The circuit courts of appeal are further empowered to enforce, set aside, or modify orders of the Federal Trade Commission, as provided in section 45 of Title 15; * * *."

Said Section 5 of the Federal Trade Commission Act provides in subdivision (c) thereof, in part:

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith

served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, * * *."

16. Each of your petitioners maintains in this Circuit a sales office in the City of Chicago, State of Illinois, 557 and regularly carries on business in this Circuit within the meaning of Section 5 of the Federal Trade Commission Act in that each of said petitioners is regularly engaged in the sale of rigid steel conduit and other products to purchasers in this Circuit. Moreover, each of your petitioners is required by said Order of the Commission to cease and desist from continuing to use in this Circuit certain acts and practices in the sale of rigid steel conduit in interstate commerce, including a basing-point method of quoting and selling such conduit.

Wherefore, believing that the aforesaid "Findings as to the Facts and Conclusion" and "Order to Cease and Desist" are erroneous, unauthorized and without foundation in law or in fact, your petitioners pray:

(1) That a copy of this petition be served forthwith by the Clerk of this Court upon the Federal Trade Commission pursuant to the provisions of subdivision (c) of Section 5 of the Federal Trade Commission Act.

(2) That this Court review said "Findings as to the Facts and Conclusion" and said "Order to Cease and Desist" of the Commission, and set aside and vacate said Findings, said Conclusion and said Order.

(3) That this Court grant such other and further relief as this Court may deem proper.

Dated: July 27, 1944.

Wright, Gordon, Zachry, Parlin & Cahill,
63 Wall Street,
New York 5, New York.
By Thurlow M. Gordon,
A Partner
Attorneys for Petitioners, General Electric Company and General Electric Supply Corporation.

BLEED THROUGH – POOR COPY

559 In the United States Circuit Court of Appeals.
* * (Caption—8644) * *

STATEMENT OF POINTS UPON WHICH THE PETITIONERS INTEND TO RELY.

(Filed July 21, 1945. Kenneth J. Carrick, Clerk.)

560 To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

General Electric Company and General Electric Supply Corporation, petitioners in the above entitled Case No. 8644, having duly filed with this Court on the 28th day of July, 1944 a petition to review and set aside an order to cease and desist (hereinafter called the Order) of the Federal Trade Commission (hereinafter called the Commission), made and entered on the 6th day of June, 1944, now, pursuant to the orders of this Court duly made and entered on the 4th day of August, 1944 and the 6th day of March, 1945, jointly and severally make and file this statement of points setting out the assignments of errors which they intend to urge and rely upon in support of said petition.

1. The effect of said Order is to compel petitioner General Electric Company, acting independently and not by collusion, to sell rigid steel conduit at f.o.b. mill prices and to realize the same mill net return per unit on all sales of rigid steel conduit, and by reason thereof said
561 order is arbitrary, unlawful and exceeds the powers of the Commission.

2. The effect of said Order is to prohibit petitioner General Electric Company, acting independently and not by collusion, from selling rigid steel conduit at delivered prices and from realizing varying mill net returns per unit on sales of such conduit in different markets, and by reason thereof said Order is arbitrary, unlawful and exceeds the power of the Commission.

3. Said Order prohibits petitioner General Electric Company from quoting or selling rigid steel conduit at prices differing in terms of mill nets according to the location of purchasers even though such differences in mill nets are the result of efforts of said petitioner to meet in good faith the competition of other conduit sellers,

and by reason thereof said order is arbitrary, unlawful and exceeds the power of the Commission.

4. Said Order prohibits petitioner General Electric Company from absorbing freight in the sale of rigid steel conduit even though such absorption is for the purpose of meeting the competition of another conduit seller or sellers and thereby prohibits said petitioner from meeting in good faith the competition of other sellers of rigid steel conduit in many of the markets where such conduit is sold, and by reason thereof said order is arbitrary, unlawful and exceeds the power of the Commission.

5. Said Order has the effect of prohibiting petitioner General Electric Company, acting independently in the sale of rigid steel conduit, from meeting in good faith in many of the markets where such conduit is sold an equally low price of a competitor and from quoting and selling such conduit in many of such markets at the price there prevailing for conduit of like grade, quality and size, and by reason thereof said Order is arbitrary, unlawful and exceeds the power of the Commission.

562 6. Said Order has the effect of preventing petitioner General Electric Company from engaging in free and fair competition in the sale of rigid steel conduit in many of the markets where such conduit is sold and thereby limits and restricts the area in which said petitioner may sell rigid steel conduit, and by reason thereof said Order is arbitrary, unlawful and exceeds the power of the Commission.

7. Said Order in effect compels these petitioners to sell even in the export trade upon an f.o.b. mill basis, without variation in the mill net received on account of the location of purchasers, although Section 2 of the Clayton Act, as amended, has no application to discriminations in the export trade, and although such variations are normal, usual and necessary, and are not unlawful or unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act.

8. Said Order prohibits petitioner General Electric Company, acting independently and in good faith to meet competition, from quoting or selling rigid steel conduit at prices consisting of the sum of the price in effect at a point other than the shipping point plus freight from said other point to destination, and by reason thereof said Order is arbitrary, unlawful and exceeds the power of the Commission.

9. Said Order prohibits petitioner General Electric Company, acting independently and in good faith to meet competition, from quoting or selling rigid steel conduit at prices calculated or determined pursuant to or in accordance with any basing-point-delivered-price method, and by reason thereof said Order is arbitrary, unlawful and exceeds the power of the Commission.

10. The prohibitions of the paragraph of said Order, of which subparagraphs "(a)", "(b)", "(c)" and "(d)" are a part, are too vague, too indefinite and too ambiguous to serve as a guide to petitioner General Electric Company as to what it may or may not do in the conduct of its business, in that

563 (i) said paragraph directs the respondents therein named, including said petitioner, to cease and desist from doing any of the things specified in such sub-paragraphs

"for the purpose or with the effect of systematically matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill nets received on sales to different purchasers",

without defining the meaning or intended effect of the words "systematically matching" or the words "systematic discriminations";

(ii) said subparagraph "(a)" prohibits said respondents, including said petitioner, from quoting or selling rigid steel conduit.

"at prices calculated or determined pursuant to, or in accordance with, the basing-point, delivered-price system",

without defining or describing the kind of "basing-point, delivered-price system" to which said Order refers;

(iii) said subparagraph "(b)" prohibits said respondents, including said petitioner, from selling conduit at delivered prices

"systematically equivalent to, the sum of the price in effect at, plus a transportation charge factor from, any point other than the actual shipping point",

without defining the meaning or intended effect of the words "systematically equivalent to" as used in such part of said Order;

(iv) said subparagraph "(c)" prohibits said respondents, including said petitioner, from selling conduit at delivered prices which

564 "systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination", without defining the meaning or intended effect of the words "systematically reflect" as used in such part of said Order; and

(v) said subparagraph "(d)" prohibits said respondents, including said petitioner, from selling conduit at prices which

"systematically differ in terms of mill nets according to the location of purchasers",

without defining the meaning or intended effect of the words "systematically differ" as used in said subparagraph.

By reason of the foregoing said Order is arbitrary, unlawful and exceeds the power of the Commission.

11. The prohibitions of said paragraph of said Order apply in any and all circumstances, although the methods of selling so prohibited, if adopted independently and not by collusion, would not be unfair or discriminatory or otherwise unlawful, and by reason thereof said Order is arbitrary, unlawful and exceeds the power of the Commission.

12. The paragraph of said Order, of which sub-paragraphs "(a)", "(b)", "(c)" and "(d)" constitute a part, is arbitrary, unlawful and exceeds the power of the Commission for the reasons stated in the paragraphs of this statement of points numbered "1" to "11", inclusive, and additionally in that

(i) the prohibitions of said paragraph and of each of said subparagraphs are based in part upon the provisions of Section 2 of the Clayton Act, as amended, relating 565 to discriminations in price, and to that extent are outside the scope of the Commission's complaint herein, because said complaint is based upon charges of alleged unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act and does not in terms charge any violation of Section 2 of the Clayton Act, as amended;

(ii) the proceeding before the Commission was not commenced or carried on under Section 2 of the Clayton Act, as amended, and the conduct of such proceeding was inconsistent therewith because the Commission delegated to a trial examiner authority to hold hearings and take evidence relative to the charges in the complaint;

(iii) said Order, insofar as it is based on alleged discrimination in price, was made without reference to any of the provisos contained in said Section 2 of the Clayton Act, as amended, or any of the defenses provided therein and without findings by the Commission in respect thereof; and

(iv) the prohibitions contained in said paragraph and in each and all of said subparagraphs are too vague, too indefinite and too ambiguous to provide or constitute any standard by which petitioner General Electric Company can reasonably be expected to be governed in the conduct of its affairs.

13. The prohibition in said subparagraph "(c)" of said Order against the use by petitioner General Electric Company of a delivered price consisting, in part, of a transportation factor less than the actual cost of transportation from point of shipment to destination is arbitrary, unlawful and exceeds the power of the Commission, in that the inclusion of such a transportation factor does not constitute unfair competition within the meaning of Section 5 of the Federal Trade Commission Act or discrimination in price within the meaning of said Section 2 of the Clayton
566 Act, as amended, or otherwise, where such delivered price is not less than the delivered price at which conduit of like grade and quality is sold by said petitioner to other purchasers, or where the delivered price of such conduit is not less than the delivered price at which conduit of like grade and quality is sold by others to the same purchaser or to other purchasers similarly located.

14. The portion of the paragraph of said Order containing subparagraphs numbered "1" to "9", inclusive, directing the respondents therein named, including these petitioners, to cease and desist from "continuing * * * any planned common course of action", insofar as such language is intended to or does prevent said petitioners from using a basing-point-delivered-price method independent of collusion or conspiracy and for the bona fide purpose of meeting competition, is arbitrary, unlawful and exceeds the power of the Commission, for the reasons stated in the paragraphs of this statement of points numbered "1" to "13", inclusive, and for the further reason that such prohibition is not within the issues raised by the pleadings.

15. Subparagraph "1" of said Order enjoins methods

of competition and acts and practices not specified in the complaint of the Commission and not within the issues raised by the pleadings by requiring said respondents, including these petitioners, to cease and desist from "quoting or selling rigid steel conduit at prices calculated or determined pursuant to or in accordance with any other plan, system, or formula which produces identical price quotations or prices for rigid steel conduit by respondents using such plan, system, or formula at points of quotation or sale, or to particular purchasers, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents as against any of the other respondents",

567 and by reason thereof said Order is arbitrary, unlawful and exceeds the power of the Commission.

16. Subparagraph "2" of said Order, in so far as it prohibits these petitioners, acting independently in the conduct of their business and not by agreement with others, from adhering to any particular prices, terms or conditions of sale, is arbitrary, unlawful, not within the issues raised by the pleadings and exceeds the power of the Commission.

17. Subparagraphs "3" and "4" of said Order are arbitrary, unlawful and exceed the power of the Commission, in that said subparagraphs

(i) prohibit the compilation and circulation of accurate freight rate information that is a matter of public record and the use of freight rates so compiled and circulated;

(ii) prohibit the compilation of such freight rates or of information relating thereto by or for any of said respondents, including these petitioners, for their own independent use; and

(iii) prohibit the use of such freight rates or of information relating thereto so compiled, circulated or received in the past or in the future even though such use is independent of collusion.

18. Subparagraph "5" of said Order, in so far as it prohibits these petitioners or either of them from seeking or receiving from any of said other respondents information needed or required by petitioners to avoid violation by them of provisions of Section 2 of the Clayton Act, as amended, is arbitrary, unlawful and exceeds the power of the Commission.

19. Subparagraphs "7" and "8" of said Order, in so far as they direct petitioner General Electric Company,

BLEED THROUGH – POOR COPY

acting independently in the conduct of its business, to
568 cease and desist from "using" certain forms of contracts or agreements and from investigating or checking prices, quantities, terms or conditions of sale, are arbitrary, unlawful, not within the issues raised by the pleadings and exceed the power of the Commission.

20. Subparagraph "9" of said Order directing petitioners to cease and desist from doing or causing any of the things forbidden in subparagraphs "1" to "8", inclusive, to be done through respondents Donley, Blake, Organization Service Corporation "or any other individual corporation, or organization" is arbitrary, unlawful and exceeds the power of the Commission, for the reason that it prohibits petitioners from employing any individual, corporation or organization in a lawful manner and for lawful purposes.

21. The paragraph of said Order containing said subparagraphs "1" to "9", inclusive, is so vague, indefinite and ambiguous as not to provide or constitute a standard of conduct by which petitioners can reasonably be expected to be governed in the conduct of their affairs, and by reason thereof is unlawful and exceeds the power of the Commission.

22. Such portion of said Order as directs petitioner General Electric Supply Corporation to

"cease and desist from aiding, assisting, or cooperating in any manner with the respondents subject to the provisions of paragraphs numbered 1 to 8, inclusive, of this order, or any of them, in doing any of the things forbidden in said paragraphs,"

prohibits said petitioner from engaging in acts, practices and methods relating to the quoting of prices on and sale of rigid steel conduit not forbidden by law, and by reason thereof is arbitrary, unlawful and exceeds the power of the Commission.

569 23. By prohibiting individual action resulting in so-called "matched prices", said Order is in effect a prohibition against the meeting of competition even in good faith, although such competition is a normal and usual method of doing business, has never been regarded as immoral, unfair or tending to monopoly, is not prohibited by Section 5 of the Federal Trade Commission Act, and is specifically permitted by Section 2 of the Clayton Act, as amended, and its absolute prohibition in said Order is arbi-

trary, unlawful and beyond the power of the Commission and in derogation of the rights of these petitioners under said Section 2 of the Clayton Act, as amended, and the Fifth Amendment to the Constitution of the United States.

24. In so far as said Order or any part thereof is intended to or does prohibit or prevent these petitioners or either of them from entering into agreements pursuant to or in accordance with the Webb Export Trade Act (15 U. S. C. A. § 61, et seq.) or the Miller-Tydings Act (15 U. S. C. A. § 1), said Order is arbitrary, unlawful and exceeds the power of the Commission.

25. In so far as said Order or any part thereof is intended to or does prohibit or prevent petitioner General Electric Company from entering into agreements with petitioner General Electric Supply Corporation, a wholly owned subsidiary of General Electric Company, relating to the quoting and sale of rigid steel conduit, such Order is arbitrary, unlawful and exceeds the power of the Commission.

26. Regardless of any collusion or other cooperative action to which these petitioners were allegedly parties, the prohibitions of said Order hereinabove mentioned are excessive, arbitrary and beyond the power of the Commission as a matter of law and are in derogation of petitioners' rights under Section 2 of the Clayton Act, as amended, and of the Fifth Amendment to the Constitution of the United States, in that said paragraphs do not
570 merely prohibit illegal collusive action but forbid petitioners from acting individually and in good faith and in a legal manner from meeting the competition of other conduit sellers in the various markets where conduit is sold.

27. The prohibitions of said Order hereinabove mentioned are not supported by the "Findings as to the Facts and Conclusions" of the Commission or by the record before the Commission and instead rest upon theoretical assumptions and conclusions of law inconsistent with the usual, normal and proper methods of conducting business. In seeking to impose said prohibitions the Commission has erroneously assumed that it is immoral and unlawful for a seller of rigid steel conduit to realize varying mill net returns on sales in different markets, that such a seller should be forbidden to compete in the various markets where conduit is sold and should be limited to the area

surrounding its plant, that a purchaser of conduit should not be permitted a choice of sellers from whom to buy, that a seller's shipment of conduit to purchasers outside the area surrounding his plant is wasteful and an improper method of distribution, and that it is the function of the Commission to define the proper manner in which sellers of conduit should conduct their business. Each and all of such assumptions are erroneous, without support in fact and contrary to law, and by reason thereof said Order is arbitrary, unlawful and exceeds the power of the Commission.

28. The prohibitions of said Order abridge and nullify the rights of petitioners to meet competition in violation of Section 2 of the Clayton Act, as amended, and of the Fifth Amendment to the Constitution of the United States, usurp the legislative functions and powers of Congress in violation of Article I, Section I of such Constitution by limiting and proscribing beyond the Commission's power the methods of competition which petitioners may employ, and enjoin, proscribe and fetter petitioners' right to
571 engage in free and fair competition and to sell steel conduit at delivered prices, and by reason of the foregoing said Order is arbitrary, unlawful and exceeds the power of the Commission.

29. The Commission erred in subparagraph "(a)" of paragraph numbered "Five" of its Findings in implying, suggesting or finding that conduit sellers, including these petitioners, established through collective action a basing-point-delivered-price method for quoting prices on and selling conduit; that in the establishment of said method such sellers had the purpose of limiting and restraining the normal forces of competition; that in the establishment of said method such sellers recognized that by virtue of location some of such sellers could, by reflecting such advantage of location in their prices, exclude others from selling in certain markets; and that in the establishment of said method such sellers recognized that in order to maintain a price level high enough to permit each seller to sell in the natural territories of other conduit sellers, price competition must be restrained.

30. The Commission erred in subparagraph "(d)" of paragraph numbered "Sixteen" of its Findings in stating or finding that the failure of prices in the conduit industry to respond to changing conditions of supply and demand,

both locally and nationally, indicates the absence of effective competition in such industry.

31. The Commission erred in subparagraph "(a)" of paragraph numbered "Seventeen" of its Findings to the extent the Commission found that the use by conduit sellers, including petitioner General Electric Company, of the pricing formula previously described therein requires any of such sellers to discriminate in price among purchasers contrary to Section 2 of the Clayton Act, as amended, or constitutes an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act.

572 32. The Commission erred in subparagraph "(b)" of paragraph numbered "Seventeen" of its Findings in finding that a conduit seller whose mill is not located at a basing point and who sells to purchasers in the seller's home town and at other points where the seller has a freight advantage as compared with mills located at the controlling basing point, charges fictitious delivery costs to such purchasers, and that in all such cases a conduit seller increases his mill net or real price by the exact amount necessary to produce a quotation equivalent to the sum of the controlling base price plus delivery charge factor from that base to the particular destination.

33. In implying, suggesting or finding that a conduit seller's "mill net" is such seller's "real price" the Commission erred in subparagraph "(b)" of paragraph numbered "Seventeen" of its Findings, in the next succeeding unlettered paragraph, in subparagraph "(c)" of said paragraph numbered "Seventeen" and in subparagraph "(a)" of paragraph numbered "Eighteen" of said Findings.

34. The Commission erred in said unlettered subparagraph of paragraph numbered "Seventeen" of the Findings in finding that a conduit seller whose mill is not located at a basing point and who sells at destinations where such seller is at a freight disadvantage as compared with the controlling base, shrinks his mill net or real price by the exact amount necessary to produce a quotation equivalent to the sum of the controlling base price plus the delivery charge factor from that base to the particular destination.

35. The Commission erred in subparagraph "(c)" of said paragraph numbered "Seventeen" in finding that when a conduit seller whose plant is located at a basing point quotes at destinations controlled by another base,

such seller shrinks his mill net or real price by the exact amount necessary to produce at any such destination a quotation equal to the sum of the controlling base price plus delivery charge factor from that base.

573 36. The Commission erred in subparagraph "(d)" of said paragraph numbered "Seventeen" in finding that the pricing pattern referred to therein amounts to each seller inviting other sellers to share in the available business in his freight-advantage territory in return for the privilege of sharing in the available business in the freight-advantage territory of such other sellers, that such pricing pattern promotes the shipping of conduit by conduit sellers outside their respective freight-advantage territories with the attendant costs and without tending to increase the total consumption of conduit, that such pricing pattern requires the maintenance of a higher price level than would otherwise be necessary, and that by denying to some purchasers the advantages of their location with respect to points at which conduit is produced, sellers are enabled to subsidize their own sales to other purchasers who are not so favorably located.

37. The Commission erred in subparagraph "(a)" of paragraph numbered "Eighteen" of its Findings in finding that each conduit seller knows that by use of the basing-point-delivered-price formula he will be able to quote a price at any given destination identical with the prices quoted by others pursuant to such method, that thus all users of such method will be enabled to present to a prospective purchaser a condition of matched prices in which such purchaser is isolated and deprived of any choice on the basis of price, that in producing such prices sellers must, at numerous destinations, increase their mill nets or real prices and at numerous destinations concurrently reduce their mill nets, that systematic price variations according to the pattern described do not represent competition in the ordinary meaning of that term, and that each seller using such method consciously intends that no attempt be made to exclude any seller from the natural freight-advantage territory of another and by the use of such method invites others to share the available business in his natural market in return for a reciprocal invitation.

574 38. The Commission erred in subparagraph "(b)" of paragraph numbered "Eighteen" of its Findings in

finding that the basing-point-delivered-price formula referred to therein is a pricing system recognized by economists as a controlled price or monopolistic price system, that it does not in its operation or results conform to the recognized economic principles which indicate the existence of free or effective competition, that one of the characteristics of effective competition in the sale of conduit is that prices readily respond to changing conditions of supply and demand, that respondents' system has produced a high degree of price rigidity and at times prices have even moved contrary to what would be expected in a market amenable to the law of supply and demand, that the use of such formula produces a condition inconsistent with the existence of effective competition, that the systematic pattern of discriminations among purchasers of conduit would not exist concurrently with effective competition, and that the use of such formula indicates the absence of effective competition.

39. The Commission erred in subparagraph "(c)" of said paragraph numbered "Eighteen" in finding: that the economic principle that in a truly competitive market the unit price of a homogenous commodity tends to become approximately uniform does not serve to explain the results of the use of respondents' pricing formula, that the tendency toward price uniformity in a free market results from the fact that in the purchase and sale of units of a homogenous commodity in such market sellers are indifferent as to whose money they get for their commodity and buyers are indifferent as to whose commodity they get for their money, that the systematic differences in mill nets accepted by conduit sellers violate "the principle of indifference", and that the law of uniform price is limited to prices resulting from actual sales and has no application to and cannot explain uniformity of price quotations.

575 40. The Commission erred in subparagraph "(b)" of paragraph numbered "Nineteen" in concluding that the capacity, tendency and effect of the use by each respondent named in Count II of the complaint of the basing-point-delivered-price method referred to therein to determine price quotations and prices which will be made to conduit purchasers at any given destination concurrently with similar use of the same pricing method by other respondents has been and is to hinder, lessen, and restrain competition in price in the sale and distribution of conduit,

BLEED THROUGH – POOR COPY

to deprive purchasers of the benefits of competition in price, to unfairly discriminate among purchasers and to create in each respondent a dangerous tendency toward a monopolistic control over price in the sale and distribution of conduit.

41. The Commission erred in failing to consider a large body of expert testimony by economic witnesses and facts which are a part of common knowledge of which this Court can take judicial notice showing

(a) the disadvantage and dislocation which would attend selling at uniform f. o. b. prices;

(b) the revolutionary effects upon the national economy, particularly in the heavy industries and in industries competing with imports or involving exports, which would result from compulsory f. o. b. mill pricing with no differences in mill nets; and

(c) the practice of selling in different markets at the price there prevailing has been a normal and usual method of doing business ever since history began, and heretofore has never been regarded as unfair, immoral or tending to monopoly but on the contrary permits sellers to reach wider markets, permits buyers to enjoy the benefits of competition and extends to the public the benefits of mass production.

576 42. The paragraph of said Order containing subparagraphs "1" to "9", inclusive, is arbitrary, unlawful and exceeds the power of the Commission, on the ground that no substantial evidence appears in the record herein showing that these petitioners or either of them or any of their officers, representatives, agents, or employees, or any of them, have at any time entered into, continued, cooperated in, or carried out any planned common course of action, understanding, agreement, combination, or conspiracy, between either or both of said petitioners and any one or more other conduit sellers, or at the time of the making of said Order, or at any other time, threatened or intended to enter into, continue, cooperate in, or carry out any planned common course of action, understanding, agreement, combination, or conspiracy between either or both of said petitioners and any one or more other conduit sellers, to do any of the things set out or specified in any of said subparagraphs "1" to "9", inclusive, of said Order, and no substantial evidence appears in the record indicating or showing that these petitioners, or either of

them, or any officer, representative, agent or employee of either of them committed any of the acts or participated in any of the practices mentioned or referred to in any of said subparagraphs "1" to "9", inclusive, pursuant to or in accordance with any planned common course of action, understanding, agreement, combination or conspiracy with any one or more other conduit sellers.

43. The Commission erred in paragraphs numbered "One" to "Sixteen", inclusive, and subparagraph "(a)" of paragraph numbered "Nineteen" of the Commission's Findings, in so far as these petitioners and each of them are concerned, as regards each and every part or portion of said paragraphs implying, suggesting or finding that these petitioners or either of them

(i) were a party to or participated in or carried out any planned common course of action, understanding, agree-
577 ment, combination, or conspiracy with one or more other respondents before the Commission relating to any of the matters set out or referred to in subparagraphs "1" to "9", inclusive, of said Order, or

(ii) did any of the things or participated in any of the practices set out or referred to in said subparagraphs "1" to "9", inclusive, of said Order pursuant to any planned common course of action, understanding, agreement, combination, or conspiracy with one or more other respondents before the Commission,

on the ground that, as to these petitioners and in the respects above stated, such parts or portions of said Findings are not supported by substantial evidence, the intention hereof being to include specifically, without limiting the scope of the foregoing, all parts or portions of said Findings of the nature hereinabove mentioned appearing in subparagraphs "(q)" and "(1-d)" of paragraph "One", subparagraph "(c)" of paragraph "Two", subparagraphs "(a)", "(b)" and "(c)" of paragraph "Four", subparagraphs "(a)" and "(b)" of paragraph "Five", subparagraphs "(a)", "(b)" and "(c)" of paragraph "Six", paragraph "Seven", subparagraphs "(b)" and "(e)" of paragraph "Eight", subparagraph "(d)" of paragraph "Nine", subparagraphs "(a)" and "(c)" of paragraph "Ten", subparagraphs "(a)" and "(c)" of paragraph "Eleven", paragraphs "Twelve" and "Fourteen", subparagraphs "(a)" and "(b)" of paragraph "Fifteen", subparagraphs "(c)", "(d)" and "(e)" of paragraph

BLEED THROUGH – POOR COPY

"Sixteen", and subparagraph "(a)" of paragraph numbered "Nineteen", on the ground that, as to these petitioners and in the respects above mentioned, such parts or portions of said Findings are not supported by substantial evidence.

44. The Commission erred in its "Conclusion" in holding that the acts and practices of the respondents be-
578 fore the Commission, including these petitioners, constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Dated: New York, N. Y., June 20, 1945.

Respectfully submitted,

Cahill, Gordon, Zachry & Reindel,
By Thurlow M. Gordon,
A Partner,
Attorneys for petitioners General Electric Company and General Electric Supply Corporation,
Office and P. O. Address:
63 Wall Street,
New York 5, N. Y.

579 IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

Spang Chalfant, Inc., and
H. G. Morrow,
Petitioners,
against
Federal Trade Commission,
Respondent.
} 8649.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL TRADE COMMISSION.

(Filed Aug. 2, 1944. Kenneth J. Carrick, Clerk.)

580 To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now comes your Petitioners Spang Chalfant, Inc., a Pennsylvania corporation, and H. G. Morrow, by their attorneys, and jointly and severally present their petition to review and set aside the order of the Federal Trade Commission (hereinafter referred to as the Commission), made and entered on the 6th day of June, 1944, and in support thereof respectfully show as follows:

Statement of the Nature of the Proceedings as to Which Review is Sought.

First: The order of the Commission herein which your Petitioners seek to have reviewed and set aside arises out of a complaint issued by the Commission on January 25, 1941, (hereinafter sometimes called the complaint) 581 against (a) Rigid Steel Conduit Association, an unincorporated association (dissolved in 1940), certain individuals alleged to be its officers and to constitute its board of directors, and certain corporations and individuals alleged to be its members; (b) The National Electrical Wholesalers Association, an unincorporated association, and certain individuals alleged to be its officers and members of its Conduit Committee, and certain concerns alleged to be members of said Association; and (c) certain

BLEED THROUGH – POOR COPY

other individuals and concerns who are alleged to have cooperated with other respondents in respect of matters alleged in the complaint.

A. The Commission's Complaint.

Second: The complaint contains two counts, in both of which the Commission charges violation of Section 5 of the Federal Trade Commission Act (15 U. S. C. § 45). In Count I it is alleged that the Petitioners and other respondents have entered into and are engaged in an unlawful understanding, agreement, combination and conspiracy for the purpose and with the effect of substantially restricting, suppressing, eliminating and frustrating actual and potential competition as to price, and otherwise, in the sale and distribution of rigid steel conduit (hereinafter called conduit) in commerce between and among the various states of the United States and in the District of Columbia. The complaint further alleges that, pursuant to, and in furtherance of, said unlawful understanding, agreement, combination and conspiracy, the Petitioners and other respondents adopted, maintained and used certain practices and methods, including the basing-point method of quoting and selling conduit. (Count I was dismissed as against Petitioner Spang Chalfant, Inc.)

582 Third: Count II of the complaint is directed against the corporate Petitioner, and other corporations (as against five of which the complaint was dismissed) and a partnership consisting of four named individuals, all of whom are together referred to in the complaint as respondent "conduit sellers". That Count charges, in substance, that the use by any such respondent of the basing-point method of quoting and selling conduit, which knowledge that the other respondent "conduit sellers" use the same method of quoting and selling, constitutes in itself, irrespective of any agreement, combination or conspiracy, an unfair method of competition in violation of the provisions of Section 5 of the Federal Trade Commission Act.

Fourth: In Count II it is alleged by way of specification that each of the respondent "conduit sellers", including the corporate Petitioner, with knowledge that the other respondent "conduit sellers" simultaneously do likewise, generally refrains from quoting prices f. o. b. its place of production or shipment that are independent of and un-

related to delivered price quotations determined from a basing-point formula; that, in arriving at amounts quoted in its published price cards, it specifies that delivered costs to any intending purchaser at his destination shall be the figure resulting from the use of a formula made up of a basing-point price plus freight adders or factors applying from one or more specified basing points; and that through the use of such formula uniformity in delivered price quotations of all such conduit sellers at a given time and destination is inherent in, and a necessary result of, "such method or system of basing-point-delivered-price-quotations." It is further alleged in Count II that each such
583 conduit seller habitually and systematically demands, charges, accepts and receives as an incident to such basing-point method of delivered price quotations larger amounts for products of equal quality and quantity from their respective customers located near their respective places of business and manufacture than from other customers located at greater distances therefrom and thereby causes such nearby customers to pay more, and the more distant customers to pay less, than would otherwise be the case, thereby depriving the nearby customers of price advantages which they would naturally enjoy by reason of their proximity to points of production.

Fifth: The acts, practices and methods of each respondent "conduit seller" as described in Count II of the complaint (when done and used as, and with the result, therein described) are therein alleged (a) to be to the prejudice of the public; (b) to have a dangerous tendency to hinder, lessen and prevent, and to have actually hindered, lessened and prevented competition in price in the sale of conduit in commerce; (c) to have the capacity and tendency unreasonably to restrain, and to have unreasonably restrained, such commerce; (d) to have a dangerous tendency to create in each respondent "conduit seller" a monopolistic control over price in the sale and distribution of conduit; (e) to cause unfair and discriminatory treatment among the customers of each such respondent "conduit seller"; and, therefore, (f) to constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

584 B. The Petitioners' Answers

Sixth: The Petitioners filed two separate answers to the complaint: one by Petitioner Spang Chalfant, Inc. and one by Petitioner H. G. Morrow. In such answers, the Petitioners in substance, denied the allegations of Count I of the complaint as to the existence of the understanding, agreement, combination and conspiracy alleged therein and denied other material allegations of said Count. In such answers, the respective Petitioners, in substance, admitted the allegation of Count II of the complaint that they, respectively, generally quote and sell conduit at prices determined in accordance with the basing-point method of pricing, namely, at delivered prices based on their respective announced prices therefor at certain basing points, to which the amount of rail freight charges from the basing point to the place of delivery is added to arrive at the delivered prices, and denied other allegations of said Count II and in such answers it was specifically alleged that the respective policies and practices of the Petitioners in the sale of conduit are lawful and within their respective rights to meet competitive prices and in so doing to sell their respective products at different locations and to different customers at such different prices as may be required to that end.

Introduction of Evidence and Final Hearing.

Seventh: At numerous hearings before a Trial Examiner appointed by the Commission evidence to support the charges of the complaint was presented on behalf of the Commission and evidence in defense against such charges was presented on behalf of the respective Petitioners and other respondents. Thereafter the Trial Examiner
585 filed his "Report upon the Evidence" and exceptions thereto were filed by the respective Petitioners and other respondents; and other exceptions to such Report were filed by counsel for the Commission. The cause came on for hearing before the Commission in May, 1943, on briefs and oral argument.

The Order of Which Review Is Sought.

Eighth: On June 6, 1944, the Commission issued its Findings as to the Facts and Conclusion and its Order to Cease and Desist entered thereon; and the Commission subsequently served copies of such Findings, Conclusion and Order upon the respective Petitioners.

Facts And Statutes Upon Which Venue Is Based.

A. The Statutes.

Ninth: The statutes under which this Court has jurisdiction to grant the relief prayed for in this petition are Section 128 of the Judicial Code (28 U. S. C., Section 225), and Section 5 of the Federal Trade Commission Act (15 U. S. C., Section 45). 28 U. S. C., Section 225, provides in paragraph (e):

"The Circuit Courts of Appeal are further empowered to enforce, set aside or modify orders of the Federal Trade Commission as provided in Section 45 of Title 15 * * *;"

15 U. S. C., Section 45, provides in paragraph (c) in part as follows:

586 "(c). Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, * * *."

BLEED THROUGH – POOR COPY

B. The Facts.

Tenth: At various times referred to in the complaint, your Petitioner Spang Chalfant, Inc. carried on business in this Circuit within the meaning of Section 5 of the Federal Trade Commission Act and your Petitioner H. G. Morrow was an officer of Petitioner Spang Chalfant, Inc. Moreover, your Petitioners are required by said order of the Commission to cease and desist from using in or in connection with the sale of conduit in commerce, as the
587 term "commerce" is defined in the Federal Trade Commission Act, certain acts and practices, among others the quoting and selling of conduit in this Circuit at prices calculated or determined pursuant to or in accordance with the basing-point method of quoting and selling conduit.

Prayer For Relief.

Wherefore, your Petitioners pray:

1. That a copy of this petition be served forthwith by the Clerk of this Court upon the Federal Trade Commission pursuant to the provisions of subdivision (c) of Section 5 of the Federal Trade Commission Act (15 U. S. C., Section 45 (c)).
2. That this Court review said Order of the Commission, together with its Findings as to the Facts and Conclusion, and set aside and vacate said Findings, Conclusion and Order.
3. That this Court grant such other and further relief as this Court may deem proper.

Dated July 31, 1944.

Sullivan & Cromwell,
by S. Pearce Browning, Jr.,
a Partner,
Attorneys for Petitioners,
48 Wall Street,
New York, N. Y.

588 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.
* * (Caption—8649) * *

STATEMENT OF POINTS.

(Filed June 21, 1945. Kenneth J. Carrick, Clerk.)

589 The above named petitioners, having filed their petition to review and set aside the Order of the Federal Trade Commission made and entered on the 6th day of June, 1944, herewith make their statement of the points on which they intend to rely on the appeal:

1. The Federal Trade Commission (hereinafter referred to as "Commission") erred in its Conclusion in holding that the acts and practices of petitioners constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

2. The Order of the Commission is not supported by the evidence, is arbitrary and without basis in law, is vague, indefinite and ambiguous and exceeds the powers of the Commission in so far as it orders petitioners to "cease and desist from doing any of the following things for
590 the purpose or with the effect of systematically matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill nets received on sales to different purchasers:

"(a) Quoting or selling rigid steel conduit at prices calculated or determined pursuant to, or in accordance with, the basing-point, delivered-price system.

"(b) Quoting or selling rigid steel conduit at delivered prices calculated as, or systematically equivalent to, the sum of the price in effect at, plus a transportation charge factor from, any point other than the actual shipping point.

"(c) Quoting or selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination.

"(d) Discriminating among purchasers by quoting or selling rigid steel conduit at prices which systematically differ in terms of mill nets according to the location of purchasers, and which mill nets, plus common carrier trans-

BLEED THROUGH – POOR COPY

portation charges to the respective locations of such purchasers, produce delivered costs identical with those to such purchasers from differently located respondents."

3. The Commission erred in its "Findings as to the Facts" in the following respects:

(a) The Commission has failed to indicate in its "Findings as to the Facts" (hereinafter called "Findings") which of the petitioners were found by the Commission,
591 on the basis of evidence, to be connected with the respective matters set forth in the Findings and has referred to the petitioners and to the other respondents by the general term "respondent conduit sellers" to connect all or some of the petitioners with matters referred to in a particular finding, without any finding to designate which, if any, of the petitioners herein were actually connected with or took part in or were claimed to be connected with or to have taken part in said matters, and without support in the evidence for such findings as against the petitioners.

(b) The Commission erred in Paragraph Fifteen (a) in finding that through the use of the basing-point delivered-price formula, whether with or without the use of common delivery charge factors and common freight rate books, respondent conduit sellers have been able to achieve a substantial degree of delivered price identity in quoting and selling conduit.

(c) The Commission erred in Paragraph Fifteen (b) in finding that the pricing system used by respondents had an effect, whether substantial or otherwise, in securing and maintaining identity of delivered price quotations and prices in private sales.

(d) The Commission ered in Paragraph Sixteen (c) in finding that respondent conduit sellers refused to quote true f. o. b. mill prices.

(e) The Commission erred in Paragraph Sixteen (d) in finding that failure of prices in the rigid steel conduit industry to respond to conditions of supply and demand, both locally and nationally, indicates the absence of effective competition.

592 (f) The Commission erred in Paragraph Sixteen (e) in finding that there are respondent conduit sellers who actually distribute their products in sections of the United States where other conduit sellers do not attempt to make sales.

(g) The Commission erred in the findings set forth in Paragraph Seventeen.

(h) The Commission erred in the findings set forth in Paragraph Eighteen.

(i) The Commission erred in the findings set forth in Paragraph Nineteen (b).

Sullivan & Cromwell,
By Edward H. Green,
a Partner,
Attorneys for Petitioners,
48 Wall Street,
New York 5, N. Y.

Dated June 18, 1945.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—8642) * *

NOTICE AND MOTION FOR AN EXTENSION OF TIME FOR FILING STATEMENT OF POINTS AND DESIGNATION OF PORTIONS OF THE TRANSCRIPT TO BE INCLUDED IN THE PRINTED RECORD, FOR PETITIONING FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE, ETC.

(Filed July 28, 1944, Kenneth J. Carrick, Clerk.)

Service acknowledged, Richard P. Whiteley, Acting Chief Counsel Federal Trade Commission, July 27, 1944.

BLEED THROUGH – POOR COPY

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.
* * (Caption—8642) * *

NOTICE AND MOTION FOR AN EXTENSION OF TIME FOR FILING STATEMENT OF POINTS AND DESIGNATION OF PORTIONS OF THE TRANSCRIPT TO BE INCLUDED IN THE PRINTED RECORD, FOR PETITIONING FOR LEAVE TO ADDUCE ADDITIONAL EVIDENCE, FOR STAY OF ENFORCEMENT OF ORDER AND FOR OTHER RELIEF.

Sir:

Please Take Notice that on the 28th day of July, 1944, we will file with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit the joint and several motion of the above-named Petitioners for an order granting relief as follows:

1. That the time within which the Petitioners may file a statement of points herein and the time within which to serve and file a designation or stipulation of the portions of the transcript to be contained in the printed record in this Court be extended until four months after the date upon which the Federal Trade Commission shall file in this Court a complete transcript of the record before the Commission;

2. That the time within which to file a petition for leave to adduce additional evidence be extended until five months after the date on which the Federal Trade Commission shall file in this Court said complete transcript;

3. That a single statement of points on behalf of all the Petitioners may be filed setting out jointly and severally the errors asserted and intended to be urged on behalf of one or more Petitioners, as well as errors asserted and intended to be urged on behalf of all Petitioners;

4. That the Petitioners, in assigning error in their statement of points with respect to the admission or rejection of evidence, may make references to the pages of the transcript in lieu of quoting in full the evidence in respect of the admission or rejection of which error shall be so assigned;

5. That enforcement of the Commission's order in this cause be stayed pending the review thereof by this Court.

In support of this motion, there is attached thereto the affidavit of Hoyt A. Moore, Esq.

Dated New York, N. Y., July 26, 1944.

Cravath, Swaine & Moore,
By Hoyt A. Moore,
a Partner,
Attorneys for the Petitioners,
15 Broad Street,
New York 5, N. Y.

To William T. Kelley, Esq.,
Chief Counsel for the Respondent,
Federal Trade Commission,
Pennsylvania Avenue at Sixth Street,
Washington, D. C.

BLEED THROUGH – POOR COPY

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Clayton Mark & Company, Fritz-Moon Tube Company, Inc., Laclede Steel Company, National Electric Products Corporation, Republic Steel Corporation, Walker Brothers, The Youngstown Sheet and Tube Company, James M. Barton, I. A. Bennett and Hervey S. Walker,
Petitioners,
against
Federal Trade Commission,
Respondent.
} Case No.

State of New York, County of New York. } ss:

Hoyt A. Moore, being duly sworn, deposes and says:

1. I am an attorney and counsellor-at-law, duly admitted to practice in all the Courts of the State of New York and am a member of the firm of Cravath, Swaine & Moore, the attorneys for the above-named petitioners (hereinafter sometimes referred to as the Petitioners), who have joined in one joint and several petition to this Court to review and set aside an order of the Federal Trade Commission.

2. This affidavit is submitted in support of a motion on behalf of the Petitioners (a) for an extension of time within which to file a statement of points and to serve upon other parties and file with the Court a designation of the portions of the transcript of the record in the proceeding in which such order of the Federal Trade Commission was made, which portions are to be contained in the printed record of this Court, (b) for stay of enforcement of said order, and (c) for other relief incident thereto specifically set forth in the notice of said motion.

3. The motion in connection with which this affidavit is made accompanies a petition to be filed in this Court to

review and set aside order of the Federal Trade Commission (hereinafter called the Commission). Said order directs that the Petitioners and others cease and desist from engaging in certain alleged unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

4. The Findings as to the Facts and Conclusion upon which said order of the Commission was made are extensive, consisting of 50 single-spaced typewritten wide pages. The record in the proceeding before the Commission upon which said Findings as to the Facts and Conclusions are based is voluminous. Hearings in the proceeding before the Trial Examiner appointed by the Commission began on September 15, 1941, and were concluded on March 31, 1942. The typewritten transcript of the oral testimony consists of more than 6,600 pages. Approximately 1,000 exhibits were received in evidence, most of which were introduced on behalf of the Commission. Many single exhibits consist of a large number of pages, with the result that the exhibits so received in evidence taken together comprise thousands of pages.

5. Said Findings as to the Facts, Conclusion and order of the Commission were dated and filed on June 6, 1944, and on or shortly after that date were served on the Petitioners.

6. The pertinent portions of the Rules of this Court and Statutes relating to the filing of a statement of points are the following:

"* * * The party seeking review shall file a petition and a statement of points * * * within the time prescribed by statute for the filing of such petition." (Subdivision 1 of Rule 34 of this Court)

"Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States * * * by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside." (Subdivision (c) of Section 5 of the Federal Trade Commission Act)

"1. * * * [The statement of points] shall set out separately and particularly each error asserted and intended to be urged. No appeal shall be considered unless such a

BLEED THROUGH – POOR COPY

statement of points shall have been so filed." (Subdivision 1 of Rule 9 of this Court)

"2. When the error urged goes to the admission or to the rejection of evidence, the statement of points shall quote the full evidence so admitted or rejected and the objections and rulings thereon, unless the quotation is extremely long or unless the court shall order that page references in lieu of quotations be made." (Subdivision 2 of Rule 9 of this Court)

"The time for taking any action under this rule (except where the time is fixed by statute) may be enlarged by a judge of this court, upon verified petition or motion supported by affidavit." (Subdivision 8 of Rule 34 of this Court)

7. In the proceeding before the Commission the law firm in which I was a partner, and which had the firm name Cravath, de Gersdorff, Swaine, & Wood, appeared for and represented only one of the respondents in said proceeding, namely, The Youngstown Sheet and Tube Company, one of the above-mentioned Petitioners, and preparations had been made by me and under my direction to file in a Circuit Court of Appeals having jurisdiction thereof a separate petition of said respondent to review and set aside said order of the Commission. Within the last few days, namely, on and since July 21, 1944, my present firm, Cravath, Swaine & Moore, has been requested to file in this Court a joint and several petition of all the Petitioners above named to review and set aside said order, and we have undertaken so to do. The preparation of a statement of points as required by the above-mentioned Rules of this Court to accompany such joint and several petition requires a far more extensive examination and study of the record in said proceeding than that required for the preparation of a statement of points to accompany a petition by Petitioner The Youngstown Sheet and Tube Company, which alone we previously represented. Said voluminous record of testimony and exhibits must be examined in the light of said Findings as to the Facts, Conclusion and order of the Commission. To do that will require a review of all the objections made and exceptions taken in the course of the proceedings before the Trial Examiner of the Commission on behalf of any or all of said Petitioners, and of the question whether and to what extent said Findings as to the Facts in so far as they relate to the respective Peti-

tioners are sustained by evidence. Many and various errors will have to be asserted in order to raise and preserve the many questions of fact and law arising out of the charges made in the complaint of the Commission in said proceeding and out of said Findings as to the Facts made by it as they affect the respective Petitioners. Some of the errors to be urged will be common to all the Petitioners; some of them may affect only one or more of the Petitioners.

8. Duplication and repetition in the statement of points would be required, if each error asserted were asserted separately and particularly on behalf of each of the Petitioners. Such duplication and repetition can be avoided, if all errors to be urged by any one or more of the Petitioners may be asserted with joint and several effect in a single document and if alleged error in the admission or exclusion of evidence to which substantially similar objections or exceptions were noted on the record by different Petitioners may be combined in a single assignment of error in each instance. In order that extremely long quotations may not be required in asserting error in the admission or exclusion of evidence, it would be useful if this Court by order, as provided in subdivision 2 of Rule 9 of the Rules of this Court, as quoted above, should permit that page references in lieu of quotations be made.

9. Designation or stipulation as to the portions of the transcript of the record before the Commission which are to be contained in the printed record is required by subdivision 5 of Rule 34 of the Rules of this Court. Said subdivision 5, by reference to the provisions of Rule 75 of the Federal Rules of Civil Procedure, requires that all matter not essential to the decision of the questions presented shall be omitted from the printed record. Selection of the portions of the transcript to be designated or stipulated will depend, therefore, upon the points presented by the Petitioners in their statement of points. After the selection thereof it will be necessary to indicate the testimony designated or stipulated by appropriate reference to the certified transcript from which the record is to be printed. While all or most of the Petitioners may have one or more copies of the reporter's typewritten transcript of the oral evidence introduced in the proceeding before the Commission, they do not have copies of or reasonable access to many of the exhibits that were introduced in evidence. For

BLEED THROUGH – POOR COPY

the foregoing reasons the Petitioners will be unable, within the time within which the Petitioners are permitted by Section 5 of the Federal Trade Commission Act to file their petition for a review of said order of the Commission, to prepare a statement of points and will be unable, within the time specified in the Rules of this Court, to prepare such a designation of the portions of the transcript to be contained in the printed record as is required by said Rules. Moreover, an extension of the time specified in such Rules for designating the portions of the transcript to be contained in the printed record will provide an opportunity to determine whether it may be possible to stipulate with counsel for the Commission as to portions of the transcript to be contained in the printed record.

10. Moreover, the Petitioners are located in, or have their chief business offices in, Pennsylvania, Ohio, Illinois, and Missouri, respectively, and it will be necessary that the firm of Cravath, Swaine & Moore, as attorneys for the Petitioners, consult in various places with the respective executives of the Petitioners and with their local counsel in order that said firm may prepare fully and adequately a statement of points.

Wherefore, this Court is respectfully requested to enter an order granting the motion of the Petitioners (a) for an extension of time within which to file a statement of points and within which to serve and file a designation of the portions of the transcript to be contained in the printed record in this Court until four months after the date upon which the Federal Trade Commission shall file in this Court a complete transcript of the record before the Commission in the above-mentioned proceeding, (b) for stay of enforcement of the order of the Commission pending the review thereof by this Court and (c) for other relief incident thereto specifically set forth in the notice of said motion.

Hoyt A. Moore

Sworn to before me this 26th day of July, 1944.

William J. Nolan, Jr.,
Notary Public, New York Co.

(Notarial Seal)

N. Y. Co. Clk's No. 109, Reb. No. 182N-5. Nassau Co. Clk's No. 11-N-45.

Certificates filed also in Dutchess, Suffolk and Westchester Counties.

Commission Expires March 30, 1945.

593 And afterwards, to-wit, on the 4th day of August, 1944, the following further proceedings were had and entered of record, to-wit.

August 4, 1944.

* * (Caption—8642) * *

Before: Honorable William M. Sparks, Circuit Judge.

On motion of counsel for Petitioners, it is ordered that the time for filing a Statement of Points and Designation of portions of the record to be printed is hereby extended to a period of 120 days from the date of the filing of the Transcript of Record in this Court.

It is further ordered that the enforcement of the Order of the Federal Trade Commission be stayed pending the Petition for Review.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—8642) * *

NOTICE OF MOTION AND AFFIDAVIT.

(Filed Jan. 23, 1945, Kenneth J. Carrick, Clerk.)

594 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—8642) * *

NOTICE AND MOTION FOR SIMPLIFYING OF THE RECORD AND REDUCING THE PORTIONS OF THE FILED TRANSCRIPT TO BE PRINTED.

Sirs:

Please Take Notice that on the 23rd day of January, 1945, we will file with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit in the above-entitled cause, wherein review is sought of an order of the Respondent made and entered on June 6, 1944, in the proceeding before the Respondent entitled In the Matter of

FILED THROUGH = POOR COPY

Rigid Steel Conduit Association, et al., Docket No. 4452, a motion on behalf of the Petitioners for an order granting the following relief:

Physical Exhibits.

1. (a) That the exhibits or copies of exhibits filed in this Court by the Respondent as a part of the certified transcript of the record in the above-mentioned proceeding shall be treated as and deemed to be, physical exhibits, and need not be printed as part of the printed transcript of record herein; (b) that such exhibits shall constitute for all purposes a part of the record on review in this Court of the above-mentioned order of the Respondent and on any petition for certiorari to the Supreme Court of the United States that may be filed in this cause; (c) that any
595 party may refer to said exhibits in their briefs and arguments with like effect as if they were printed as part of the printed transcript of record; and (d) that said exhibits shall be preserved by the Clerk of this Court in his office at Chicago, Illinois, pursuant to the rules and practice of this Court, and in such manner as he may deem reasonably appropriate for their preservation, and shall be available to the Court and at all reasonable times to any Petitioner for review of the order of the Respondent the review of which is prayed for in this cause for inspection and examination during the pendency in this Court of this cause or of any other cause on petition for review of said order.

Written Motions, Petitions and Statements of Contentions.

2. That any written motion, petition, affidavits and statements in support thereof, or exceptions which was filed in said proceeding with the Respondent or with its Trial Examiner need not be printed, but may be submitted to the Court in the original form in which it was submitted to the Respondent or to said Trial Examiner and may be referred to in the briefs and arguments with the same force and effect as if it were printed as a part of the printed record in this cause in this Court.

Designation of Evidence.

3. That in designating the portions of the record to be printed, the parties to the above-mentioned causes, in lieu of designating the pages and lines containing offers of exhibits, objections and arguments by Counsel and rul-
596 ings and statements by said Trial Examiner with respect thereto, may set forth at the appropriate place in the designation for printing and in the printing of the record a statement in substantially the following form (the blank spaces therein being appropriately titled):

"Commission's [or Petitioners'] Exhibit was offered and received in evidence.";

and said parties need not designate for printing objections and arguments by counsel with respect to the admission or exclusion of oral testimony or the rulings of said Trial Examiner with respect thereto, unless the admission or exclusion of the particular testimony or ruling of said Trial Examiner with respect thereto is intended to be challenged on review by the party making the designation; nor need any of said parties designate for printing any objection to the offer of, or the admission or exclusion of, any exhibit or any ruling of said Trial Examiner thereon, unless such party shall intend to challenge the admission or exclusion of such exhibit.

4. That in designating portions of the record to be printed, the Petitioners in the above-mentioned causes need designate only those portions thereof upon which they, respectively, intend to rely as being in support of their affirmative case, and the Respondent shall designate the other portions of the record, if any, upon which it shall intend to rely as supporting its Findings as to the Facts and Conclusions and its Order to Cease and Desist.

Printing.

5. That in printing the designated portions of the record, all corrections to the record of said proceeding
597 before said Trial Examiner which during the course of the hearings were directed by him to be made, and which have not been made in the filed transcript, or which have been or may hereafter be agreed upon by Counsel for the Petitioners and Counsel for the Respondent, shall be

BLEED THROUGH – POOR COPY

made in the body of the printed record, and all designations of parts of the record to be printed shall be deemed to incorporate the appropriate corrections as though said corrections had already been physically made in the transcript.

6. That the following items need not be included in the printed record, even though they may be included in parts of the filed transcript which shall be designated by one or more of the parties to any of the causes pending in this Court for the review of said order:

(a) The designations of parts of the record to be printed;

(b) Any notations in the record showing that discussions were had "off the record" and notations regarding recesses taken in the course of the hearing.

7. That any Petitioner seeking review in this Court of the order of the Respondent referred to above may, as a part of its Statement of Points, Designation of the Record to be printed or Brief, by a specific reference to any particular part of the Statement of Points, Designations of the Record to be printed, or Briefs filed or to be filed on behalf of any other such Petitioner or Petitioners, incorporate and adopt such parts with the same force and effect as if such Petitioner had physically incorporated such part in his or its Statement of Points, Designation
598 of the Record to be printed, or Brief.

8. That appearances of Counsel noted on the record of hearings subsequent to the first hearing before said Trial Examiner shall not be printed except in the case of appearance by a Counsel for any party whose appearance had not previously been noted in the record.

9. That the index appearing at the beginning of the transcript of the record of each day's proceedings before said Trial Examiner shall not be printed.

10. That the exceptions to the Report of said Trial Examiner which were filed with the Respondent by its Counsel shall not be printed.

11. That the answer to the complaint of the Respondent and the Exceptions to the Report of said Trial Examiner which were filed by any other party to said proceeding before the Respondent that is not, at the time of the printing of the record, a Petitioner for review of the order of the Respondent, shall not be printed.

In the motion which we will file as stated above we will pray also for such other and similar relief to shorten and simplify the printed record on review as to the Court shall seem proper.

An affidavit in support of this motion is attached hereto.

Cravath, Swaine & Moore,
By Hoyt A. Moore,
A Member of the Firm.
Attorneys for the Petitioners in Case No. 8642,
15 Broad Street,
New York 5, N. Y.

Ferris E. Hurd,
Counsel for said Petitioners,
120 South LaSalle Street,
Chicago 3, Illinois.

Dated January 19, 1945.

To

The Federal Trade Commission, Washington, D. C.

599 IN THE UNITED STATES CIRCUIT COURT OF APPEALS
• • (Caption—8642) • •

State of New York, }
County of New York. } ss:

William W. Robison, being duly sworn, deposes and says:

1. I am an attorney and counselor at law, duly admitted to practice in all courts of the State of New York and in the United States Circuit Court of Appeals for the Second Circuit, and am associated with the firm of Cravath, Swaine & Moore, attorneys for the Petitioners in the above-entitled cause, wherein the Petitioners seek review of an order made by the Federal Trade Commission (hereinafter referred to as the Commission) in a proceeding entitled "In the Matter of Rigid Steel Conduit Association, et al., Docket No. 4452."

2. This affidavit is submitted in support of a motion on behalf of the Petitioners for an order permitting the Peti-

BLEED THROUGH – POOR COPY

tioners in this cause, and other Petitioners who have filed in this Court petitions for the review of said order of the Commission, to dispense with the printing of any of the exhibits filed in this Court as a part of the certified tran-
600 script of the record before the Commission, for relief in connection with the designating and printing of other parts of said transcript, and for such other and further relief as may be appropriate in the premises. Such motion is made in the interest of simplifying and reducing the size of the record to be printed in the above-mentioned causes by limiting the printed record to matters regarded as necessary and suitable for the convenient presentation, consideration and disposition of the several petitions for review of said order of the Commission, and in order to avoid unnecessary printing expense, unnecessary use of manpower, excessive use of critical materials, and for other purposes which appear herein.

3. The order of the Commission of which review is sought herein was made on June 6, 1944, and directs the Petitioners to cease and desist in the sale of Rigid Steel Conduit from certain practices specified in said order. Said order was accompanied by findings of the Commission entitled "Findings as to the Facts and Conclusion".

4. After the filing of the petition in this cause, the Commission filed in this Court a transcript of the record of the proceedings before the Commission consisting of certain pleadings, orders, testimony and exhibits. Said record includes more than 6,600 pages of transcript of testimony and a large number of exhibits, many of them voluminous, comprising 16 large volumes, and estimated to comprise about 4,800 pages.

5. Counsel for the Petitioners believe that the relief prayed for in this motion is both desirable and necessary, in order to serve the best interests of the Court and of the parties to the several causes wherein review of said order of the Commission is sought, to the end that a suitable,
601 and at the same time sufficient, printed record may be presented to the Court in said causes.

6. The above-mentioned exhibits filed in this Court include a large amount of voluminous material, including minutes of at least 53 meetings of Rigid Steel Conduit Association or of its Board of Directors, and minutes of at least 32 meetings of prior organizations known as the Rigid Conduit Section of Associated Manufacturers of

Electrical Supplies and the Rigid Conduit Section of National Electric Manufacturers Association, printed and tabulated price cards issued at various dates by the various manufacturers of Rigid Steel Conduit that were Respondents in the proceeding before the Commission, printed freight rate bulletins and supplements thereto, and printed delivery charge booklets issued by the various Respondent manufacturers, five separate and lengthy lists of members at different dates of the Respondent National Electrical Wholesalers Association, long printed forms of consigned stock agreements which were used by various of the Respondent manufacturers, and other long printed forms of so-called "specific building contracts" which were used by various of such Respondents, and copies of numerous invoices for Rigid Steel Conduit produced from the files of eight of such Respondent manufacturers, and numerous other documents, the printing of which would be both difficult and expensive. Counsel for the Petitioners in the above-entitled cause believe that printing of the voluminous exhibits contained in the record therein will not so far serve the convenience of the Court, or of the parties to the various petitions for review of the above-mentioned order, as to justify the expense that would be incidental thereto, or the unnecessary use of paper and
602 labor that would be required thereby. If and to the extent that the Court shall have occasion to examine such exhibits or any of them, they will be readily available for that purpose in the form in which they have been filed in the office of the Clerk of this Court.

7. Counsel for said Petitioners believe that the printed record in this Court can be materially shortened by the omission therefrom of many objections, statements and arguments by Counsel, and rulings and remarks of the Trial Examiner of the Commission in said proceeding before it during the course of said proceeding with respect to the omission or exclusion of evidence and numerous notations contained in the filed transcript of the record regarding discussions "off the record" and the taking of brief recesses and the resumption of hearings after such recesses. Accordingly, it is proposed that all such matters shall be eliminated in the designations of the portions of the transcript to be printed as the record in this Court, except in cases where the party designating portions of

BLEED THROUGH – POOR COPY

the record including such matters intends to rely thereon in this Court.

8. Statements of Points to be relied upon which have heretofore been filed by some of the Petitioners in petitions filed in this Court for review of said order of the Commission present contentions that some of the Findings of the Commission as to the Facts and some of its Conclusions are not supported by any substantial competent evidence, and it is anticipated that Statements of Points hereafter to be filed by other Petitioners will present like contentions regarding some of such Findings and Conclusions. Such contentions under literal application of the rules of this Court might require such Petitioners to 603 designate for printing all the evidence contained in the filed transcript, in order to establish that there is no evidence to support a given Finding or Conclusion, and that notwithstanding the fact that a very large part of such evidence does not have any relevancy whatsoever to issues that will be presented to the Court. Counsel for the Petitioners believe that there are numerous parts of such filed transcript which neither the Petitioners nor the Commission will deem necessary or appropriate to be included in the printed record of this Court. Although Petitioners are unable to determine what parts of such filed transcript the Commission may deem material or important to support its contentions, they nevertheless believe that the printed record can be shortened, and the best interests of all the parties protected, if Petitioners be required to designate for printing only such parts of the filed transcript as they, respectively, shall deem material and necessary to support their affirmative positions with respect to the evidence before the Commission, and shall not be required to designate for printing the evidence which the Commission might conceivably wish to point to in support of its Findings and Conclusions. On the other hand, it is submitted, the interests of the Commission will be amply protected, if it shall be permitted and required to designate for printing such of the evidence contained in the filed transcript as it shall deem material to support its Findings as to the Facts and its Conclusions.

9. In the course of the proceedings before the Trial Examiner of the Commission, many corrections were directed, upon application of the respective parties to said

proceeding before the Commission or at his own in-
604 stance, by said Trial Examiner to be made in the original transcript of the testimony taken before him. Some of the corrections so directed to be made were made by the Official Reporter of the Commission by rewriting of the pages on which such corrections were directed to be made. Many other of the corrections so directed to be made were not made by rewriting of the respective pages, but deponent believes that they were made and noted on the copy of the Official Reporter's transcript that was filed in the docket section of the Commission. Deponent is informed, however, that such last-mentioned corrections have not been made in the copy of the transcript of proceedings before said Trial Examiner that has been certified by the Secretary of the Commission and filed in this Court. It is submitted that all corrections that were directed by said Trial Examiner to be made in the typewritten transcript of testimony taken before him should be made in the printing of the record in this Court.

10. Counsel for the Petitioners believe that the printed record in this Court can be considerably shortened without prejudice to any party and without inconvenience to the Court, if certain formal matters are omitted from the printed record, namely:

(a) The designations of parts of the record to be printed; and

(b) All notations in the record showing that discussions were had "off the record", and all notations regarding recesses taken in the course of the hearing.

11. By the order of the Commission sought to be reviewed herein, its complaint was dismissed as against some of the Respondents that were named in such complaint and had filed answers thereto, and some others of the Respond-
ents that were named in such complaint and filed
605 answers thereto have not filed, or joined in, any petition in this Court for review of the order of the Commission as against them. It is submitted that the printing in the record in this Court of answers to the complaint of the Commission filed by any of such Respondents will serve no useful purpose and should be omitted.

12. In addition to the petition filed in the above-entitled cause for review of said order of the Commission, other petitions for review of said order have been filed in this Court by other Petitioners named in said order.

BLEED THROUGH – POOR COPY

Counsel for the Petitioners herein believe that a substantial amount of duplication of documents and needless repetition of statements can be avoided, if any Petitioner in any of the causes pending in this Court for review of said order shall be permitted to incorporate by reference in the Statement of Points, Designation of Parts of the Record to be printed, and Brief to be filed by or on behalf of such Petitioner, specific portions of corresponding documents filed on behalf of any other Petitioner for review of said order.

13. The transcript of the proceedings before the Trial Examiner of the Commission made from day to day includes a detailed statement in the record of each day's proceedings of the various Counsel appearing on the respective days, comprising lists of such Counsel with their respective firm names and addresses, numbering from seven or eight to as many as nineteen on different days. Each such daily transcript includes also an index showing the witnesses called, the exhibits marked for identification and the exhibits admitted in evidence as shown in such daily transcript. Inasmuch as the rules of this Court require that the record to be printed herein shall include at the front thereof a complete index of the printed
606 record, and inasmuch as a single statement of the appearances before the Commission of Counsel for the respective parties will serve every purpose in that regard on the review in this Court, it is submitted that the printing of such statements of daily appearances and of such indexes to the day to day portions of the transcript should be omitted, with the exception of the appearances noted on the record of the first day's hearing before the Trial Examiner of the Commission and any appearance by a Counsel for any party whose appearance was not noted in the record of such first day's hearing.

14. The transcript of the record filed in this Court includes exceptions to the Report of said Trial Examiner filed with the Commission by its Counsel. Inasmuch as the Commission in framing its Findings as to the Facts and Conclusion has at its election made disposition of the exceptions filed by its Counsel to the Report of said Trial Examiner, the printing in the record in this Court of such exceptions would serve no useful purpose and would involve useless expense of printing.

15. A member of the above-mentioned firm, as Counsel

for the Petitioners in this cause, has conferred with the Assistant General Counsel of the Commission who has charge for the Commission of the above-mentioned causes as to whether it might be possible by negotiation to agree upon a stipulation wherein the Commission would consent to the various items of relief regarding the printing of the record in this Court that are prayed for in the motion in support of which this affidavit is made. Such Assistant General Counsel stated to such Counsel for the Petitioners
607 that it would be useless to undertake negotiations with the Commission for a stipulation to that end, and that he would prefer that the Petitioners do not ask for any departure in the printing in this cause of the record in this Court from the procedure prescribed in the rules of this Court.

16. The making of the motion in support of which this affidavit is made is not for the purpose of delay in the final disposition of the above-entitled cause. On the contrary, it is submitted that the granting of such motion will tend to expedite the completion of the printing of the record in this Court.

Wm. W. Robison.

Subscribed and sworn to before me this 19th day of January, 1945.

Kenneth H. B. Cudmore,
Notary Public, New York County,
N. Y. Co. Clk's No. 314, Reg. No. 283-C-6
Nassau Co. Clk's No. 22-C-46,
Certificates filed also in Richmond and Suffolk Counties,

Commission Expires March 30, 1946.

608 Endorsed: In the United States Circuit Court of Appeals. * * (Caption—8642) * *. Notice of Motion and Affidavit. Filed Jan. 23, 1945. Kenneth J. Carrick, Clerk.

BLEED THROUGH – POOR COPY

609 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.
* * (Caption—8642) * *

ANSWER TO PETITIONERS' MOTION FOR SIMPLIFYING THE RECORD AND REDUCING THE PORTIONS OF THE FILED TRANSCRIPT TO BE PRINTED.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit.

Comes Now the Federal Trade Commission, respondent herein, and by its counsel submits its answer to petitioner's "Motion For Simplifying Of The Record And Reducing The Portions Of The Filed Transcript To Be Printed", as filed in this Court January 23, 1945, and states:

1. Said motion comprises eleven items, numbered 1 to 11, inclusive.

2. As is shown by attached Exhibit "A", counsel for petitioners never conferred with counsel for respondent with respect to negotiating any stipulation covering items numbered 2, 3, 4, 5, 6, 7, 8, 9, 10 or 11, presented by said motion, and did not until January 19, 1945, give any intimation of their desire to avoid designating particular exhibits for printing. Although this Court on August 4, 1944, granted the motion of petitioners that they be given this time as a part of 150 days within which among other things, to make such designations. It now appears that if peti-
610 tioners had utilized the 150 days granted them by this honorable Court, items 2 to 11, inclusive, presented by the pending motion could have been handled through negotiations with counsel for respondent. Such negotiations would have made unnecessary the filing of said motion on those items because counsel for respondent have not and do not now oppose the handling of matters under items numbered 2 to 11, inclusive, of said motion, insofar as they relate to or would accomplish a reduction of the portions of the record to be printed.

3. However, the proposal contained in item number 1 of said motion is opposed by counsel for respondent on the following grounds:

(a) The exhibits petitioners now seek to have excluded from ready and convenient review by the court as a part

of the printed record constitute the principal part of the record upon which the findings of fact are based. Those findings of fact are challenged by petitioners.

(b) The respondent is unlikely to designate for printing as much as 50% of the exhibits in terms of bulk or pages involved. That part of such exhibits likely to be designated for printing by the respondent does not consist of booklets or of other forms usually treated as physical exhibits in cases of this kind. On the contrary, the exhibits in the case most likely to be designated by the respondent for printing are in the form of written admissions made by peti-
611 tioners in the ordinary course of business before the Commission filed its complaint in this case. It is submitted that as evidence of petitioners' purposes, courses of action and accomplishments, they should be regarded as having more probative value and thus accorded more weight than the self-serving declarations made by petitioners when they appeared as witnesses in this case to testify in their own behalf; yet it is the record of the latter that the petitioners desire printed to the exclusion of the former. Petitioners fear adding to the burden of wartime manpower shortages by printing for the conveniences of the Court a ten-word telegram, in which petitioners perhaps made a damaging admission before the issuance of the complaint in this case, but they fear no such addition through use of time, expense and effort as would be used to print ten pages of oral transcript consisting of self-serving declarations made by petitioner when called by their counsel to testify in their own defense in this case.

(c) It is submitted that for the convenience of the Court, there is more reason for the printing of such exhibits as may be designated by the parties herein than there is for the printing of the transcript of the oral testimony. The oral testimony is now before the Court in a clear typewritten record as made and certified by the official reporter in the case. On the contrary, the exhibits are now
612 before the Court only in the form of a single photostatic copy, some of which can be read only with difficulty.

(d) Under Rule 36 (5) of the rules of this Court, relating to "Special Proceedings", provision is made for the printing of such portions of the transcript as may be designated for that purpose by the opposing parties. The word "transcript" as used in this rule obviously is intended to

BLEED THROUGH – POOR COPY

include exhibits and not merely the transcript of oral testimony. The rules for designation by opposing parties of the portions of the record to be printed in cases involving review of orders of administrative agencies, such as the Federal Trade Commission, were adopted by this Court, following the opinion of the Supreme Court in *NLRB* v. *Foote Bros. Gear and Machine Corporation*, 311 U. S. 620 (1940); 121 Fed. 2d 802 (1941). The language of the statute upon which the Supreme Court based its remand in that case is the same as that of the Federal Trade Commission Act.

The effect of petitioners' motion to exclude all exhibits from printing would be to exclude from the printed record the most vital parts on which the Commission relies without even proposing a narration of such parts as a substitute as was done in the *Foote case supra*, and which later the Supreme Court held to be an inadequate substitute. The Circuit Court of Appeals for the Second Circuit had previously held that it could not order less than the
613 whole transcript to be printed if either party objected, on the ground that a consideration of the whole record was necessary to a decision of the case, *Federal Trade Commission* v. *Inecto, Inc.*, 70 Fed. 2d 370 (1934). The respondent in that case contended that it was necessary to examine the entire record to support its view that there had been no violation of the Commission's order. The Court held that it could do this only if the entire record were before it in printed form as required by the Court's rules. In paragraph 8 of the affidavit of counsel for petitioners, attached to said motion, is the concession that "literal application of the rules of this Court might require such petitioners to designate for printing all of the evidence contained in the filed transcript if petitioners are to secure the broad review of the challenge made by petitioners to the Commission's findings. Counsel for respondent submit that it will be necessary for the Court to review a number of the exhibits now in question as a part of its review of the question of whether the findings of the Commission have a proper basis in the record. They further submit that the Court should not be handicapped or inconvenienced in its review of that part of the record on that question. For that purpose, the exhibits should be accorded equal standing as a part of the printed record before the Court with that part of the record upon which the petitioners strongly rely, namely, the transcript of the oral testimony.

614 4. Notwithstanding the position above stated by counsel for the respondent in opposing item number 1 of petitioners' motion, the suggestion is here made that if convenience of the Court would be served by foregoing the printing of any exhibits, then it would appear logical to conclude that such convenience would be enhanced by also foregoing the printing of the transcript of oral testimony. If such thought is well founded and acceptable to the Court, then this may be taken as a commitment from counsel for respondent to stipulate with counsel for petitioners that if petitioners forego the printing of the transcript of oral testimony, counsel for respondent will agree that petitioners may also forego the printing of exhibits. That concession is made solely on the above stated conditions and for the purpose of serving the ends advanced by the petitioners in their motions; namely, alleviating wartime manpower and material shortages and the reduction of expense and effort involved.

For the reasons stated herein, counsel for respondent Commission oppose the motion of counsel for petitioners that the exhibits be excluded from the printed record and, submit therefore, that item number 1 of said motion should be denied.

Respectfully submitted,

Federal Trade Commission,
W. T. Kelley,
Chief Counsel,

Walter B. Wooden,
Assistant Chief Counsel.

Everette MacIntyre,
Attorney.

615 EXHIBIT "A".

January 19, 1945.

Mr. Hoyt A. Moore,
c/o Cravath, Swaine & Moore,
15 Broad Street,
New York, N. Y.

Re: Case No. 8642—Clayton Mark & Company, et al., v. Federal Trade Commission.

Dear Mr. Moore:

Your long distance call this morning was the first intimation I have had that any of counsel for petitioners was proposing an agreement concerning the portions of the record to be printed. My statements to you over the telephone were made without opportunity to fully consider or discuss the matter for the purpose of giving you a complete understanding of our position. I would repeat and amplify the substance of our conversation as follows:

My understanding of your proposal is that counsel for the Commission agree with counsel for petitioners that no exhibits be printed in this case and that only such portions of the transcript of the oral record be printed as can be agreed upon by opposing counsel. My reaction to the proposal as stated over the telephone was that I could not agree to such proposal. My stated reasons were that the exhibits constitute the principal evidence upon which the findings are apparently based. They therefore would be more important to the Court in printed form in reviewing a question of whether the findings have proper basis than the transcript of oral testimony. Further, the exhibits are not booklets such as would ordinarily be treated as physical exhibits in the case, but on the contrary are made up of many writings and declarations of representatives of the petitioners in ordinary course of business. They are now before the Court only in the form of a single photostatic copy, some of which can be read only with difficulty. From those facts it would appear that there is more reason for not printing the transcript of oral testimony than the
616 exhibits if the convenience of the Court is to be served, which, of course, is the primary consideration. The second consideration, namely, the expense, does not loom large because the record is small for the importance of the

case. In terms of bulk probably less than half of the exhibits introduced by counsel for the Commission will be designated for printing. Thus the importance of the secondary consideration is greatly reduced.

With reference to your proposal that counsel attempt to agree on designations of the portions of the oral transcript of record to be printed I suggest that the same result can be secured with less expense, time and effort on the part of counsel by the regular process of designation and counter-designation.

I would suggest that if you wish to make any statement to the Court concerning our attitude to your proposal that a copy of this letter would be the best method.

Very truly yours,

Walter B. Wooden,

Assistant Chief Counsel.

WBW:mms:lg

617 Endorsed: In the United States Circuit Court of Appeals • • (Caption—8642) • • Answer To Petitioners' Motion For Simplifying The Record And Reducing The Portions Of The Filed Transcript To Be Printed. Filed Jan 29 1945 Kenneth J. Carrick, Clerk.

618 And afterwards, to-wit, on the 1st day of February, 1945, the following further proceedings were had and entered of record, to-wit:

February 1, 1945.

• • (Caption—8642) • •

Before: Honorable William M. Sparks, Circuit Judge.

It is ordered that the motion of Petitioners for simplifying the record and reducing the portions of the filed transcript to be printed be, and it is hereby, granted.

619 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.
• • (Caption—8642) • •

NOTICE OF MOTION FOR EXTENSION OF TIME WITHIN WHICH TO DESIGNATE CONTENTS OF PRINTED RECORD AND THE POINTS UPON WHICH PETITIONERS INTEND TO RELY.

Sirs:

Please Take Notice that on the 19th day of February, 1945, we will file with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit the within motion on behalf of the petitioners in the above-entitled cause, wherein review is sought of an order of the respondent made and entered on June 6, 1944, in the proceeding before the respondent entitled In the Matter of Rigid Steel Conduit Association, et al., Docket No. 4452.

Dated, February 13, 1945.

Cravath, Swaine & Moore,
by Wm. Dwight Whitney,
A Member of the Firm,
Attorneys for the Petitioner
in Case No. 8642,
15 Broad Street,
New York 5, N. Y.

Ferris E. Hurd,
Counsel for said Petitioners,
120 S. LaSalle Street,
Chicago 3, Illinois.

To

The Federal Trade Commission,
Washington, D. C.

620 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—8642) * *

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO DESIGNATE CONTENTS OF PRINTED RECORD AND THE POINTS UPON WHICH PETITIONERS INTEND TO RELY.

To the Honorable Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now come the petitioners Clayton Mark & Company, Fretz-Moon Tube Company, Inc., Laclede Steel Company, National Electric Products Corporation, Republic Steel Corporation, Walker Brothers, The Youngstown Sheet and Tube Company, James M. Barton, I. A. Bennett, and Hervey S. Walker, by their attorneys, and jointly and severally move this Honorable Court that the time within which said petitioners, and the petitioners in other causes pending in this Court upon petitions for review of the same order of the Respondent, may file their designations of the portions of the record to be printed and their statements of points to be relied upon in the above-entitled cause and in said other causes be extended to and including the sixtieth day after the decision by the Supreme Court of the United States in the two cases now pending before that Court and entitled respectively Federal Trade Commission *vs.* Staley Manufacturing Company, *et al.* (No. 559) and Corn Products Refining Company *vs.* Federal Trade Commission (No. 680), or, if such cases be decided by the Supreme Court on different dates, after the later of
621 such decisions.

The principal issues to be presented on this appeal will involve the use by the petitioners of the so-called basing-point system. The writs of certiorari addressed to this Honorable Court in the two above-entitled causes pending in the Supreme Court of the United States were granted in part upon questions relating to the use of the so-called basing-point method of quoting and selling products, and we are informed, by an examination of the briefs of petitioners in the Supreme Court and of the opinions of the members of this Honorable Court and of the opinions of the members of this Honorable Court in such two causes, and believe (i)

BLEED THROUGH – POOR COPY

that said questions relating to said basing-point method will form the principal subject-matter for consideration by the Supreme Court therein; (ii) that the decisions in such two causes in the Supreme Court will at least throw considerable light upon the most important issues in the present cause; (iii) that accordingly a designation of portions of the record to be printed and a statement of points to be relied upon can be more intelligently and helpfully made after the decisions by the Supreme Court; and indeed (iv) that an effort to state such points, in advance of such decisions by the Supreme Court would be wasteful and would almost certainly require revision after such decisions.

And your petitioners ask such other and further relief as may to the Court seem proper.

February 13, 1945.

Cravath, Swaine & Moore,
Attorneys for the Petitioners in Case No. 8642,
15 Broad Street,
New York 5, N. Y.

Ferris E. Hurd,
Counsel for said Petitioners,
120 South La Salle Street,
Chicago 3, Illinois.

Granted:
William M. Sparks,
Judges Evans & Kerner, concurring.

March 6, 1945.

622 Endorsed: Filed February 19, 1945. Kenneth J. Carrick, Clerk.

623 IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—8642 and 8644) * *

STATEMENT BY RESPONDENT TO PETITIONERS' MOTIONS FOR EXTENSION OF TIME WITHIN WHICH TO DESIGNATE CONTENTS OF PRINTED RECORD AND THE POINTS UPON WHICH PETITIONERS INTEND TO RELY.

Comes now the Federal Trade Commission, respondent herein, and by its counsel opposes the motions above referred to. Petitioners General Electric Company and General Electric Supply Corporation, Case No. 8644, have joined with petitioners in Case No. 8642 in making these motions and in that connection have made some additional representations on their own account. As grounds for respondent's opposition the following is submitted:

The petitions for review were filed late in July, 1944. The record was certified on October 31, 1944. The three months' period intervening between those dates was available to petitioners for filing their statements of points. Before that period expired, however, petitioners sought from the Court and obtained an extension of 120 days from the date of
624 certification of the record in which to file their statements of points and their designations of the record to be printed. Subsequently they also sought and obtained from the Court over our objection an order that none of the exhibits in the case should be printed.

After having thus greatly reduced their burden of designations for printing by having none of the exhibits printed, petitioners now move for what may easily be a longer extension of time for the purposes mentioned than they were content to ask for in the first place. They now ask for a 60-day extension from the unknown date of the Supreme Court's decision in the Corn Products and Staley cases now scheduled for argument in that Court on February 28. Petitioners' motions being filed so shortly before the expiration of their 120-day extension is indicative that the extension already granted has not been utilized toward the ends for which it was granted. Petitioners in Case No. 8644, in joining with the petitioners in Case No. 8642, for purposes of this motion, state that substantial additional

BLEED THROUGH – POOR COPY

time is required independently of the pendency of the Staley and Corn Products cases because of counsel's preoccupation with other cases.

The legal questions in the present cases are quite different from those in the Corn Products and Staley cases, and accordingly the present cases must each be resolved on its own special facts of record, regardless of the outcome of the other two cases. That being so, petitioners are merely asking this further and indefinite extension of time as a matter of personal convenience. If the decisions in the Corn Products and Staley cases were to control the disposition of the present cases, then petitioners should be willing to agree to be bound by the result of the other cases. Obviously they would not be willing so to agree. The present cases involve the status of the basing point system as a collusive price-fixing device and as an unfair method of competition under Section 5 of the Federal Trade Commission Act. The Staley case involves only the status of price discriminations arising from the basing point system under Section 2(a) of the Clayton Act, as amended, and the matter of good faith to meet an equally low price of a competitor in that connection. The Corn Products case involves only price discriminations under Section 2(a) without any record showing of their connection with the basing point system. If the outcome in the Supreme Court should be unfavorable to the Commission, we would still be entitled to a decision in the present cases because they present different questions, both of fact and of law. If the outcome should be favorable to the Commission petitioners here would doubtless insist on their right to have these different questions of fact and law adjudicated.

It is not at all apparent how petitioners' designation of portions of the oral transcript to be printed could be affected by the Supreme Court's decision of the other two cases referred to. Presumably petitioners will desig-
625 nate the testimony on which they rely as favorable to them from any possible standpoint and presumably they had largely completed such selections by the time this motion was filed. By the same logic they should move the Court to vacate its order that no exhibits be printed because, in petitioners' own words, "accordingly a designation of portions of the record to be printed • • • can be more intelligently and helpfully made after the decisions by the Supreme Court." They might just as reasonably sug-

gest that such decisions would enable them to determine whether some of the exhibits should be designated for printing. Petitioners in Case No. 8644 refer to the number of exhibits to be examined as supporting the present motion, ignoring the fact that by petitioners' own former motion none of the exhibits can be designated for printing.

The prospect that the decisions of the Supreme Court will be helpful to petitioners in formulating their statements of points is quite remote in view of the different factual and legal questions here involved. The remoteness of such prospect is to be weighed against the statutory provision in Section 5(e) of the Federal Trade Commission Act that proceedings such as these "shall be given precedence over other cases pending" in the Circuit Court of Appeals and "Shall be in every way expedited." Counsel for the Commission would certainly interpose no objection to petitioners' future revision of their designations of the record and statements of points in the remote prospect above referred to. All such matters can be adequately taken care of in petitioners' briefs and argument without stopping all progress toward an adjudication of the case for an indefinite period.

For the above stated reasons it is submitted that the motions of petitioners should be denied.

Respectfully submitted,

Federal Trade Commission,
By: W. T. Kelley,
Chief Counsel.
Walter B. Wooden,
Assistant Chief Counsel.

Washington, D. C.
February 23, 1945.

626 Endorsed: In the United States Circuit Court of Appeals. * * (Caption—8642-8644) * *. Statement by Respondent in Opposition to Petitioners' Motion for Extension of Time Within Which to Designate Contents of Printed Record and the Points Upon Which Petitioners Rely. Filed Feb. 26, 1945. Kenneth J. Carrick, Clerk.

627 And afterwards, to-wit, on the 6th day of March, 1945, the following further proceedings were had and entered of record, to-wit:

March 6, 1945.

* * (Caption—8642) * *

Before:

Honorable Evan A. Evans, Circuit Judge.
Honorable William M. Sparks, Circuit Judge.
Honorable Otto Kerner, Circuit Judge.

On motion of counsel for Petitioners Clayton Mark & Company, Inc., et al., It is ordered by the Court that the time within which the said Petitioners and the Petitioners in the other causes pending in this Court upon petitions for review of the same order of the respondent, may file their designations of portions of the record to be printed and their statements of points to be relied upon be extended to and including the sixtieth day after the decision by the Supreme Court of the United States in the two cases now pending before that Court, entitled Federal Trade Commission *vs.* Staley Mfg. Co., et al. and Corn Products Refining Co. *vs.* Federal Trade Commission, or, if such cases be decided by the Supreme Court on different dates, after the later of such decisions.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of Volume V of the Printed Record, being one of 5 volumes of said Printed Record filed on May 13, 1947, in:

Cause No. 8642.

Clayton Mark & Co., *et al.*,
Petitioners,

vs.

Federal Trade Commission,
Respondent,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 20th day of October, A. D. 1948.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the seventh day of October, in the year of our Lord one thousand, nine hundred and forty-seven, and of our Independence the one hundred seventy-second.

Clayton Mark & Co., *et al.*, *Petitioners,* vs. Federal Trade Commission, *Respondent.* No. 8642.	Petition for review of Order of the Federal Trade Commission.

And on the following day, to-wit, the nineteenth day of January, 1948, the following proceedings were had and entered of record to-wit:

Clayton Mark & Co., *et al.*, *Petitioners,* vs. Federal Trade Commission, *Respondent.* No. 8642.	Petition for review of Order of the Federal Trade Commission.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Albert R. Connelley and Mr. Thurlow M. Gordon, counsel for the Petitioners, and by Mr. Everette MacIntyre and Mr. Walter B. Wooden, counsel for the Respondent, and the Court takes this matter under advisement.

And afterward, to-wit, on the twelfth day of May, 1948, an Opinion was rendered by this Court, which Opinion is in the words and figures to follow, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1947, April Session, 1948.
Nos. 8639, 8640, 8642, 8644, 8649.

Triangle Conduit & Cable Co., Inc., and The M. B. Austin Company, Enameled Metals Company, Steelduct Company and Lawrence R. Quinn, Clayton Mark & Company, Fretz-Moon Tube Company Inc., Laclede Steel Company, National Electric Products Corporation, Republic Steel Corporation, Walker Brothers, The Youngstown Sheet and Tube Company, James M. Barton, I. A. Bennett and Hervey S. Walker, General Electric Company and General Electric Supply Corporation, Spang Chalfant, Inc., and H. G. Morrow,

Petitioners,

vs.

Federal Trade Commission,

Respondent.

} Petitions for review of Order of the Federal Trade Commission.

May 12, 1948.

Before SPARKS, KERNER, and MINTON, *Circuit Judges.*

KERNER, *Circuit Judge.* Petitioners, fourteen corporate manufacturers of rigid steel conduit, and five representatives of these corporations ask us to review and set aside a cease and desist order of the Federal Trade Commission,

BLEED THROUGH – POOR COPY

upon a complaint in two counts, charging that petitioners collectively have violated § 5 of the Federal Trade Commission Act, 15 U. S. C. A. § 45, which declares unlawful "unfair methods of competition in commerce." Each of the corporate petitioners except Spang Chalfant was a member of Rigid Steel Conduit Association. That association was a respondent in the proceedings before the Commissioner, but is not a petitioner here. Each of the five individual petitioners was not only an official of one of the corporate petitioners but also served in an official capacity in directing the affairs of Rigid Steel Conduit Association.

In substance the first count alleged the existence and continuance of a conspiracy for the purpose and with the effect of substantially restricting and suppressing actual and potential competition in the distribution and sale of rigid steel conduit in commerce, effectuated by the adoption and use of a basing point method of quoting prices for rigid steel conduit. The second count did not rest upon an agreement or combination. It charged that each corporate petitioner and others violated § 5 of the Federal Trade Commission Act "through their concurrent use of a formula method of making delivered price quotations with the knowledge that each did likewise, with the result that price competition between and among them was unreasonably restrained." It alleged that nearby customers were deprived of price advantages which they would have naturally enjoyed by reason of their proximity to points of production, and that such course of action created in said conduit sellers a monopolistic control over price in the sale and distribution of rigid steel conduit.

Petitioners answered the complaint. They denied any agreement or combination. After extensive hearings before a trial examiner, the Commission made its findings of fact and conclusions of law therefrom. It found the charges to be fully substantiated by the evidence.

Rigid steel conduit[1] is a steel pipe, used primarily in the roughing-in stage of building construction where electrical wiring is necessary in order to furnish a continuous channel or container for the wiring. It is made from standard steel pipe and is produced in two types differing only in the nature of the coating applied to it. It is a standard commodity. It was first manufactured in America in 1897,

1. Hereinafter referred to as "conduit."

in or near Pittsburgh, Pennnsylvania, and originally was sold at delivered prices. The reason why delivered prices were used lay in the relative importance of transportation charges in the sale of the product. Points of production include Cohoes, New York and various places in Pennsylvania, Illinois, Indiana, West Virginia and Ohio. Various means were used to facilitate the calculation of delivered prices, but Youngstown was the first manufacturer to prepare a freight rate bulletin specially applicable to conduit sales. Similar bulletins were prepared by other manufacturers and later such bulletins were procured by some manufacturers from a traffic expert.

In addition to freight rate bulletins, another aid in computing delivered prices was the use of delivery charge tables, which were designed to simplify the procedure of figuring the delivered prices, and each petitioner refrained from publishing price quotations f. o. b. point of production or shipment, but used the practice and method of quoting price sheets, which it termed "Price Cards," in which it designated base prices f. o. b. Pittsburgh, Pa. and f. o. b. Chicago, Ill. About 1912 one manufacturer began announcing quotations of prices, based on Pittsburgh as a basing point, through the use of price cards which listed "Pittsburgh Basing Discounts" under which the discount was decreased—and the net price thereby increased—in proportion to the freight rate from Pittsburgh to the point of delivery. The practice thus established was followed by other manufacturers then in existence, and since then, up to 1930, by other manufacturers as they have entered the conduit business.

In 1930, petitioner National Electric shifted from the list and discount form of delivered price quotation to a quotation which specified the net base prices, with freight to be added, and during the next year or so other manufacturers likewise changed to the quotation of net base prices plus freight. In 1924, conduit began to be sold at prices based on Gary, Indiana, as a basing point. During that year petitioner Youngstown began to manufacture conduit at Evanston, Illinois, and inaugurated the practice of quoting and selling conduit at delivered prices based on Evanston, as well as Pittsburgh, as a basing point, the base price at Evanston being $4 above the current published price at Pittsburgh. Clayton Mark, during the period (1924-1930), had quoted conduit prices upon a Chicago base.

BLEED THROUGH – POOR COPY

Since freight rates from Chicago and Evanston were the same, Evanston ceased to be a basing point shortly after 1934. Other manufacturers followed the practices inaugurated by Youngstown and Clayton Mark.

It also appears that instead of petitioner conduit sellers using an absolute Pittsburgh plus system for all designations in their price quotations, they collectively discussed and considered the matter of maintaining and utilizing Chicago as a basing point, with its differential over Pittsburgh, and that until 1930 they followed a method of calculating delivered price quotations which provided for discounting from the Pittsburgh or Chicago base price, depending upon which base price and accompanying discount produced the lower figure at the customer's destination, and that during 1930 representatives of petitioners at a meeting of the Rigid Steel Conduit section of the National Electrical Manufacturers Association determined upon a change from that method to the one they now use. Accordingly, at the time of the hearings each of the petitioner conduit sellers quoted delivered prices for conduit based on Chicago as well as on Pittsburgh as basing points and sold at that base price.

There was testimony that the system thus used was an effective means of matching bids and price quotations, and that the quotations made by each conduit seller, irrespective of whether it had a manufacturing plant located at or near Pittsburgh or Chicago, enabled them to match their price quotations. It also appears that at times it was difficult to exactly determine the railroad tariff rate and that mistakes by some conduit sellers in the selection of a particular tariff rate to be used in a particular instance were a fruitful source of differences in the delivered prices quoted, thereby preventing a matching of such quotations. To prevent such errors, petitioners, acting through Rigid Steel Conduit Association, employed one Donley, who prepared a compilation of freight rate applicators containing the freight factor applicable from Pittsburgh to various destinations in the United States and, on a differential of $4 per ton above the Pittsburgh base price, the freight applicable from Chicago. These compilations became important adjuncts to petitioners' plans and methods in matching delivered price quotations. They were intended by petitioners to be used as their common price factors.

The findings upon which the order of the Commission is

based are lengthy and of a comprehensive nature. In these findings the petitioners are identified by name in connection with the particular activities engaged in by them as part of their general plan of suppressing price competition through the combination charged. Essentially the findings are that there was collective consideration of pricing policies on the part of representatives of petitioners in 1930 and collective considerations by such representatives of those matters through November, 1939; that by petitioners' adherence to their formula or system of pricing, their matching of bids under seal and the matching of their delivered price quotations was made effective, and a combination and conspiracy was maintained by petitioners to deprive purchasers of conduit of the benefits of competition in price, to maintain artificial and monopolistic methods and prices in the sale and distribution of conduit, to prepare and maintain common rate factors or freight adders used and useful in determining and establishing price quotations and prices for conduit, to classify customers of conduit and determine the treatment to be accorded them, to establish and maintain uniform discounts, terms and conditions of sale, to determine and control the use of warehouses in the distribution of conduit, to prepare, adopt, and use for the purpose of aiding in price maintenance and control, uniform contracts for distributors and for contractors buying for specific projects, and to enforce the terms of such contracts through investigations and reports thereon, to support and maintain their price structure through the conduct of investigations of sales and offers to sell, and the circulation of reports thereon; and that the acts and practices performed thereunder and in connection therewith, hindered, lessened and suppressed competition among sellers in the sale and distribution of conduit in interstate commerce.

These ultimate findings of fact are based upon subsidiary findings. It will not be necessary in this opinion to set forth these findings, as they appear in 38 Federal Trade Commission Decisions, 534-551. Upon these findings of fact the Commission concluded that these acts and practices constituted unfair methods of competition in commerce within the meaning of § 5 of the Act, and directed petitioners, other than General Electric Supply Corporation and Spang Chalfant, to cease and desist from entering into, continuing in, or carrying out any planned com-

BLEED THROUGH – POOR COPY

mon course of action, understanding, agreement, combination, or conspiracy between any two or more of petitioners, or between any one or more of petitioners and others not parties hereto, to do or perform any of the things specifically set forth in the order. For the injunctive paragraphs covering the specific activities, see 38 F. T. C. decisions, 593.

Petitioners assert that no finding was made as to when the conspiracy was instituted, how long it continued, and which respondents (petitioners) were members thereof. They insist that the Commission has failed to make a finding as to conspiracy charged, together with findings which would disclose how and in what manner each of the petitioners became a member thereof.

In support of their contention, petitioners argue that the finding—

> "Paragraph Nineteen: (a) Pursuant to Count I of the complaint herein the Commission concludes from the evidence of record and therefore finds that the capacity tendency and effect of the combination and conspiracy maintained by the respondents [petitioners] named therein in the manner aforesaid, and the acts and practices performed thereunder and in connection therewith * * * has been, and is, to hinder, lessen, restrain, and suppress competition in the sale and distribution of conduit * * *,"

is wholly insufficient in law, because, so they say, the finding is only a description of the "capacity tendency, and effect" of the conspiracy.

In considering this contention, it is well to remember that findings are to be construed liberally in support of a judgment or order, *Rank* v. *Kuhn*, 20 N. W. 2d 72. Whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn, *Clyde Equipment Co.* v. *Fiorito*, 16 F. 2d 106, 107, and any words which fairly import a concerted action for a conniving together to restrain trade, are sufficient to charge conspiracy, *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 117.

Pertinent and akin to the question we are now discussing are the words of Mr. Justice Douglas in his concurring opinion in the case of *United States* v. *Line Material Company*, rendered March 8, 1948, in which case, after stating that the Sherman Act outlaws price fixing combinations,

he said: "Price fixing in any form is perhaps the most powerful of all inducements for abandonment of competition. * * *. It is therefore one of the most effective devices to regiment whole industries and exact a monopoly price from the public. The benefits of competition disappear." And in the case of *United States* v. *United States Gypsum Co.*, also decided by the United States Supreme Court on March 8, 1948, the court said that price fixing, without authorizing statutes, is illegal, *per se*. See also *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392. Any combination which tampers with price structures is engaged in an unlawful activity. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221. And the existence of a plan or method which equalizes the delivered costs or prices of competitors having widely different freight costs to given destinations constitutes strong evidence in itself of an agreement to use such plan or system. *Milk and Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. 2d 478; *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F. 2d 899. And price uniformity especially if accompanied by an artificial price level not related to the supply and demand of a given commodity may be evidence from which an agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred. *Cement Manufacturers Protective Association* v. *United States*, 268 U. S. 588, 606; *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321. The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action. *United States* v. *Masonite Corporation*, 316 U. S. 265, 276. Moreover, the question we are now discussing was considered and decided in the *Federal Trade Commission* v. *The Cement Institute*, announced by the Supreme Court on April 26, 1948. In disposing of the identical question, the court solved our problem. It said:

> "It seems impossible to conceive that anyone reading these findings in their entirety could doubt that the Commission found that respondents, collectively maintained a multiple basing point delivered price system for the purpose of suppressng competition in cement sales. The findings are sufficient. The contention that they are not is without substance."

BLEED THROUGH – POOR COPY

Petitioners also stress the point that the use of the basing point method of pricing does not have any adverse effect on competition and is not oppressive. They contend that in the event we should hold that the Commission made a finding that there was a price fixing conspiracy, such a finding is not supported by the evidence.

The argument is that there is no direct evidence of any conspiracy; that if the Commission made such a finding, it is based upon a series of inferences; and that the general use of the basing point method of pricing and the uniformity of prices does not justify an inference of conspiracy. We think there was direct proof of the conspiracy, but whether there was or was not, in determining if such a finding is supported, it is not necessary that there be direct proof of an agreement. Such an agreement may be shown by circumstantial evidence. *Milk and Ice Cream Can Institute* v. *Federal Trade Commission, supra,* 480.

In this case there was evidence showing collective action to eliminate the Evanston basing point, and collective activities in promoting the general use of the formula presently to be noted. The record clearly establishes the fact that conduit manufacturers controlling 93% of the industry use a system under which they quote only delivered prices, which are determined in accordance with a formula consisting of a base price at Pittsburgh or Chicago plus rail freight, depending upon which basing point price controls at any particular destination or in any particular section of the United States; that as a result of using that formula the conduit producers were enabled to match their delivered price quotations, and purchasers everywhere were unable to find price advantages anywhere; and that purchasers at or near a place of production could not buy more cheaply from their nearby producer than from producers located at greater distances, and producers located at great distances from any given purchaser quoted as low a delivered price as that quoted by the nearest producer.

An example of an instance where petitioners have matched their bids appears where the Bureau of Supplies and Accounts, United States Navy Department requested bids under seal for the furnishing of one million feet of conduit for delivery at the Navy Yards in Philadelphia, Pennsylvania, Norfolk and Sewell's Point, Virginia. Seven of the petitioners submitted bids and matched their price quotations in terms of dollars per foot down to the fourth

decimal point. Of course, there were other instances in the record showing identity of bids. Not only did petitioners match their bids when submitted under seal to agencies of public bodies, but each, with the knowledge of the others, did likewise—used the formula for the purpose of presenting to prospective private purchasers conditions of matched price quotations.

In this state of the record it will be enough to say that Congress has left to the Commission the determination of the facts, *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, and the weight to be attributed to the facts proved and the inferences to be drawn from them, *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 739. See also *United States Malsters Ass'n* v. *Federal Trade Commission*, 152 F. 2d 161; *Milk and Ice Cream Can Institute* v. *Federal Trade Commission, supra; Fort Howard Paper Co.* v. *Federal Trade Commission, supra;* and *Federal Trade Commission* v. *The Cement Institute, supra.* Our study of this record and of the applicable law has convinced us that the Commission was justified in drawing the inference that the petitioners acted in concert in a price-fixing conspiracy.

We now turn to consider petitioners' contention that the individual use of the basing point method, with knowledge that other sellers use it, does not constitute an unfair method of competition. This contention embodies the theory of the second count of the complaint and of that part of the order to cease and desist that is directed against each of the corporate petitioners.

Briefly, the argument is that individual freight absorption is not illegal *per se*, and that the Commission's order is a denial of the right to meet competition. More specifically, petitioners say that conduit is a homogeneous product; that no buyer will pay more for the product of one seller than he will for that of another; that the buyer is not interested in the seller's cost of transportation or in any other factor of the seller's cost; that effective competition requires that traders have large freedom of action when conducting their own affairs; that in any particular market, the seller must adjust his own price to meet the market price or retire from that market altogether; that it has always been the custom of merchants to send their goods to distant markets to be sold at the prices there prevailing; that there is no lessening of competition, or injury

to competitors, when a seller absorbs freight traffic to meet lawful competition; and that it is for the court to decide as a matter of law what constitutes an unfair method of competition under § 5 of the Act. *Federal Trade Commission* v. *Gratz*, 253 U. S. 421.

On the other hand, the Commission contends that unfair methods of competition include not only methods that involve deception, bad faith, and fraud, but methods that involve oppression or such as are against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.

As already noted, each conduit seller knows that each of the other sellers is using the basing point formula; each knows that by using it he will be able to quote identical delivered prices and thus present a condition of matched prices under which purchasers are isolated and deprived of choice among sellers so far as price advantage is concerned. Each seller must systematically increase or decrease his mill net price for customers at numerous destinations in order to match the delivered prices of his competitors. Each seller consciously intends not to attempt the exclusion of any competition from his natural freight advantage territory by reducing the price, and in effect invites the others to share the available business at matched prices in his natural market in return for a reciprocal invitation.

In this situation, and indeed all parties to these proceedings agree, the legal question presented is identical with the one the Supreme Court considered in the *Federal Trade Commission* v. *The Cement Institute case, supra.* In that case, after stating that the Commission has jurisdiction to declare what conduct is an unfair method of competition, the court said: "* * * individual conduct, * * * which falls short of being a Sherman Act violation may as a matter of law constitute an 'unfair method of competition' prohibited by the Trade Commission Act. A major purpose of that Act * * * was to enable the Commission to restrain practices as 'unfair' which, although not yet having grown into Sherman Act dimensions would most likely do so if left unrestrained. The Commission and the courts were to determine what conduct, even though it might then be short of a Sherman Act violation, was an 'unfair method of competition.' This general language was deliberately left to the 'Commission and the courts' for definition be-

cause it was thought that 'There is no limit to human inventiveness in this field'; that consequently, a definition that fitted practices known to lead toward an unlawful restraint of trade today would not fit tomorrow's new inventions in the field; and that for Congress to try to keep its precise definitions abreast of this course of conduct would be an 'endless task.' "

In the light of that opinion, we cannot say that the Commission was wrong in concluding that the individual use of the basing point method as here used does constitute an unfair method of competition.

In their briefs and upon oral argument, petitioners have raised additional points. These, too, have been examined and considered by the Supreme Court in the *Federal Trade Commission* v. *The Cement Institute case, supra,* and were found lacking in merit. Hence they need not be discussed by us.

The Commission's order is affirmed and an enforcement decree will be entered. It is so ordered.

And on the same day, to-wit, the twelfth day of May, 1948, the following further proceedings were had and entered of record, to-wit:

Clayton Mark & Co., *et al.*, *Petitioners,* No. 8642 *vs.* Federal Trade Commission, *Respondents.*	Petition for Review of an Order of the Federal Trade Commission.

This cause came on to be heard on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the Order of the Federal Trade Commission entered in this cause on June 6, 1944, be, and the same is hereby, AFFIRMED, and an enforcement decree will be entered.

And afterward, to-wit, on the twenty-seventh day of May, 1948, there was filed in the office of the Clerk of this Court, a Petition for Rehearing, which petition is in the words and figures to follow, to-wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Triangle Conduit & Cable Co. Inc., and The M. B. Austin Company (No. 8639), Enameled Metals Company, Steelduct Company and Lawrence R. Quinn (No. 8640), Clayton Mark & Company, Fretz-Moon Tube Company, Inc., Laclede Steel Company, National Electric Products Corporation, Republic Steel Corporation, Walker Brothers, The Youngstown Sheet and Tube Company, James M. Barton, I. A. Bennett, and Hervey S. Walker (No. 8642), General Electric Company and General Electric Supply Corporation (No. 8644), Spang Chalfant, Inc. and H. G. Morrow (No. 8649), *Petitioners,* *vs.* Federal Trade Commission, *Respondent.*	No. 8642.

PETITION FOR REHEARING.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

NOW COME the petitioners above-named, and respectfully pray for a rehearing of their several petitions in these proceedings with respect to the Court's affirmance, on May 12, 1948, of that portion of the Commission's Order which

enjoins the use by each petitioner, individually and without combination or conspiracy, of the basing-point method of quoting prices or any other method of quoting or selling conduit at delivered prices which meet the delivered prices of other petitioners at any location and which, as among purchasers from a single petitioner, "systematically differ in terms of mill nets according to the location of purchasers" or "systematically reflect the inclusion of a transportation factor * * * less than the actual cost of transportation from point of shipment to destination" (R. 3547-48). The effect of that portion (par. V)* of the Commission's Order is to prevent each petitioner, acting individually and not in combination, from competing for business in a territory in which any other seller of conduit has a freight advantage. As conceded by the Commission (Com. Br. p. 62), that part of its Order is "novel and far reaching."

The bases of this petition for rehearing are as follows:

(1) Misapprehensions of the Court.

With reference to the issues presented by Count II of the complaint and the corresponding portion of the Order (par. V), this Court stated in its opinion (p. 13):

> "In this situation, and indeed all parties to these proceedings agree, the legal question presented is identical with the one the Supreme Court considered in the *Federal Trade Commission* v. *The Cement Institute* case, *supra.*" [16 U. S. L. W. 4359, decided April 26, 1948.]

That statement discloses that the Court misapprehended the facts in two respects:

(a) The legal question presented by Count II of the complaint in the *Conduit* case is not identical with (or even similar to) any question considered by the Supreme Court in *Federal Trade Commission* v. *The Cement Institute*, decided April 26, 1948 (hereinafter called the *Cement* case); and

(b) The parties to these proceedings *have never agreed* that the question presented by Count II of the complaint herein is identical with any question considered by the Supreme Court in the *Cement* case.

* *i.e.*, the fifth paragraph beginning with the words "It is Ordered".

(2) Position of the Parties.

The statement in the opinion that "all parties to these proceedings agree" that the question is identical with that considered by the Supreme Court in the *Cement* case overlooks the fact that both petitioners and the Commission have definitely and positively asserted the contrary to this Court.

On September 8, 1947, the Commission moved this Court to postpone all further proceedings in this case until thirty days after the Supreme Court should have decided the *Cement* case. The Commission assigned as its ground for that motion that petitioners were "relying in numerous and important respects as shown by their briefs" upon the expectation that the decision of the Supreme Court in the *Cement* case would be favorable to their contentions. In opposition to that motion petitioners submitted an affidavit, sworn to September 15, 1947, which set forth the differences between the *Cement* case and the *Conduit* case as follows:

> "• • • The complaint in the *Conduit* case charges, and the Commission here has held, that the independent use of the basing-point method of quoting prices by a conduit seller is illegal *per se* irrespective of the existence or non existence of a conspiracy. • • • In the *Cement* case, however, the complaint in its entirety was limited to charges of conspiratorial action, and even if the decision of this Court in that case should be reversed or modified, such disposition of that case could not possibly be determinative of the issues presented in the *Conduit* case.
>
> "That essential difference between the two cases has heretofore been recognized by counsel for the Commission. Directly after the Supreme Court, on March 10, 1947, granted certiorari in the *Cement* case, counsel for one of the petitioners in the *Conduit* case inquired of counsel for the Commission as to the latter's views concerning the desirability of arguing the *Conduit* case in this court in advance of a decision by the Supreme Court in the *Cement* case. In response to that inquiry, counsel for the Commission, • • • replied that 'No matter how the Cement case may be decided by the Supreme Court, the Rigid Steel Conduit case must stand or fall upon its own factual foundation,' pointing out that:

> "'So far as Count II of the case is concerned, it raises a question of law which cannot be determined by the outcome of the Cement case because the latter case is founded in both counts on the theory of conspiracy and in the Conduit case, Count II raises the question of the status of the basing point practice as an unfair method of competition and independently of the question of conspiracy.'"

At the oral argument before this Court on January 19, 1948, counsel for the Commission, in distinguishing the *Conduit* case from the *Cement* case in reply to a question by the Court (Tr. of oral argument, p. 130), made the following statement:

> "* * * we have a Count II that is founded upon Section 5 of the Federal Trade Commission Act, and we had no such question in the Cement case, in that Count II herein is not grounded upon combination or conspiracy, but solely upon the use by each petitioner of the basing-point system, and the effect of that use upon competition."

Accordingly, whatever other action be taken with respect to this petition for rehearing, it is submitted that the Court should, in fairness to the parties, correct the statement in its opinion that "all parties to these proceedings agree" that the question presented is identical with the one considered by the Supreme Court in the *Cement* case.*

(3) Differences Between the *Cement* and *Conduit* Cases.

Quite apart from the position taken by the respective parties, the fact is that the differences between the *Conduit* case and the *Cement* case are of vital importance. In each case, Count I of the complaint charges a combination and conspiracy to suppress price competition by use of the

* The Court will doubtless also wish to correct the statement in its opinion (p. 2) that "Each of the corporate petitioners except Spang Chalfant was a member of Rigid Steel Conduit Association." That statement was presumably taken from the Commission's brief (p. 3). The fact is, as pointed out in petitioners' brief (p. 53), that corporate petitioners Laclede Steel Company, Republic Steel Corporation, The M. B. Austin Company and General Electric Supply Corporation were never members of RSCA; that Youngstown was a member only during the period from December 1935 until August 1936; and that General Electric Company and Clayton Mark & Company resigned in 1938.

FILED THROUGH = POOR COPY

basing-point method of quoting prices, in violation of Section 5 of the Federal Trade Commission Act. On that phase of the case, there are, of course, several questions of law common to both cases. This petition for rehearing, however, is concerned only with Count II of the complaint, which charges that the use of the basing-point method of quoting prices by each petitioner, individually and not pursuant to any combination or conspiracy,—constitutes an unfair method of competition under Section 5 of the Federal Trade Commission Act. Count II of the complaint in the *Cement* case, on the other hand, charged that the use of the basing-point method of quoting prices, pursuant to a combination and conspiracy, resulted in price discrimination in violation of Section 2 of the Clayton Act.* The points of difference are, therefore, (a) the charge and finding in the *Conduit* case that the independent use of the basing-point method, in the absence of combination or conspiracy, is an unfair method of competition, a charge and finding not made in the *Cement* case; and (b) the charge and finding of price discrimination in violation of Section 2 of the Clayton Act in the *Cement* case, a charge and finding not made in the *Conduit* case.

(a) Combination

As Mr. Justice Burton pointed out in his dissenting opinion in the *Cement* case, the majority of the Court in that case reached the conclusion (with which he disagreed) that the evidence sufficiently supported a finding of the existence of a combination to use the basing-point method of pricing and that, while the Court held that including such combination there was a violation both of Section 5 of the Federal Trade Commission Act and of Section 2 of the Clayton Act, it

> "has not here determined the relation, if any, of either of the foregoing statutes to the absorption of freight charges by individuals when not participating in a combination of the kind charged by the Commission." (16 U. S. L. W. at p. 4373)

The importance to the decision in the *Cement* case of the element of combination was emphasized in the majority opinion both in distinguishing (at p. 4365) that decision from the Court's earlier decision in *Cement Mfrs. Protec-*

* References herein to Section 2 of the Clayton Act are to such Section as amended by the Robinson-Patman Act (49 Stat. 1526 (1936)).

tive Ass'n v. *United States*, 268 U. S. 588, and in disposing of the objections to the scope of the Order. Thus the Court said (at pp. 4371-72):

> "Most of the objections to the order appear to rest on the premise that its terms will bar an individual cement producer from selling cement at delivered prices such that its net return from one customer will be less than from another, even if the particular sale be made in good faith to meet the lower price of a competitor. The Commission disclaims that the order can possibly be so understood. Nor do we so understand it. As we read the order, all of its separate prohibiting paragraphs and subparagraphs, which need not here be set out, are modified and limited by a preamble. This preamble directs that all of the respondents 'do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding or agreement, combination or conspiracy, between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things * * *.' Then follow the prohibitory sentences. It is thus apparent that the order by its terms is directed solely at concerted, not individual activity on the part of the respondents.
>
> * * * * *
>
> "One other specific objection to the order will be noted. Paragraph 1 prohibits respondents from 'quoting or selling cement pursuant to or in accordance with any other plan or system which results in identical price quotations or prices for cement at points of quotation or sale or to particular purchasers by respondents using such plan or system, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents against any of the other respondents.' This paragraph like all the others in the order is limited by the preamble which refers to concerted conduct in accordance with agreement or planned common course of action. * * *"

The Court thus made it abundantly clear that it would not have approved the portions of the Order there under consideration in the absence of the qualifying preamble with respect to concerted action.

(b) Section 2 of Clayton Act

While the qualification in the order in the *Cement* case with respect to concerted action completely distinguishes that case from the instant case, it should be noted that even the dicta in the opinion in the *Cement* case concerning price discrimination by individual action are rendered wholly inapplicable to this case by reason of the fact that the Court in the *Cement* case was dealing with price discrimination in violation of Section 2 of the Clayton Act, which is neither charged nor found in this case.

As we have previously pointed out (Pet. Br. p. 32), differences in prices to different purchasers under the basing-point method may constitute unlawful discrimination under Section 2 of the Clayton Act. The Supreme Court in the *Cement* case was dealing with the situation where such illegality was charged and found. But in the *Conduit* case, not only is there not any charge or finding of such violation of Section 2 of the Clayton Act, but any possible claim of such violation has been expressly excluded from the case. Thus the Commission stated (Com. Br. p. 23):

> "It cannot be too strongly emphasized that there is no charge and no finding and therefore can be no issue as to whether there has been any discrimination in price violative of Section 2(a) of the Clayton Act as amended."

If, of course, this case involved price discrimination unlawful under Section 2 of the Clayton Act and such price discrimination were asserted as a violation of Section 5 of the Federal Trade Commission Act, the situation would be analogous to that considered by the Supreme Court in the *Cement* case with reference to Count I of the complaint in that case, where the Court held that conduct violative of Section 1 of the Sherman Act could also constitute a violation of Section 5 of the Federal Trade Commission Act. But the alleged price discrimination involved in this case is not claimed to be a violation of Section 2 of the Clayton Act and the findings of the Commission here do not include the findings which were made in the *Cement* case (and which would be essential to establish a violation of Section 2 of the Clayton Act) that each petitioner sold its product to two or more of its customers at different delivered prices and that the differences in such prices

> (i) are not accounted for by differences in the cost or manufacture, sale or delivery resulting from the

differing methods or quantities in which the commodity is sold or delivered;

(ii) may have the effect substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition; and

(iii) are not justified by a showing that the sale at the lower price was made in order to meet in good faith an equally low price of a competitor of the seller.

The Commission in this case asserted (Com. Br. p. 77) the novel proposition that price discrimination, not unlawful under Section 2 of the Clayton Act, may nevertheless be unlawful as on "unfair method of competition" under Section 5 of the Federal Trade Commission Act. But that position is manifestly untenable for the reason that the Congress has, by Section 2 of the Clayton Act, legislated in the specific field of price discrimination and has not left any room for the Commission, under the guise of "interpretation" of the phrase "unfair method of competition" in Section 5 of the Federal Trade Commission Act, to find unlawful any price discrimination permitted by the Congress.

In our main brief (pp. 25-29), we reviewed the legislative history of the Robinson-Patman Act, amending Section 2 of the Clayton Act, and referred to the extended consideration given by the Congress to the argument sponsored by the Commission that the definition of unlawful price discrimination should be expanded so as to include differences in the "mill net" return to the seller. The Congress refused to accept such argument and made unlawful only those price discriminations specified in the Act. It cannot be seriously contended that the Congress intended that its legislative action could be rendered futile by permitting the Commission to attain its desired objective by a new interpretation of the phrase "unfair method of competition" in the Federal Trade Commission Act.

That the legality or illegality of any price discrimination is to be measured by the terms of Section 2 of the Clayton Act was specifically recognized by the Supreme Court in *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, where, in referring to the legislative history of the Robinson-Patman Act, the Court said (p. 737):

"* * * We think this legislative history indicates only that Congress was unwilling to require f.o.b. factory pricing, and thus to make all uniform delivered

price systems and all basing point systems illegal per se. On the contrary we think that it *left the legality of such systems to be determined accordingly as they might be within the reach of § 2 (a) [of the Clayton Act], as enacted, and its more restricted prohibitions of discriminations in delivered prices.*" (Emphasis supplied.)

In upholding the Commission's contention in the present case, this Court apparently regarded as applicable the dictum* of the Supreme Court in the *Cement* case (16 U. S. L. W. at p. 4365-66) that:

> "individual conduct, * * * which falls short of being a Sherman Act violation may as a matter of law constitute an 'unfair method of competition' prohibited by the Trade Commission Act."

In the light of the fact that both counts of the complaint in the *Cement* case charged a combination in restraint of trade which would obviously violate the Sherman Act, the purpose of the Court in making that statement is not immediately apparent. That dictum, however, does not have any bearing on the question before this Court, which relates not to the general concept of restraint of trade embodied in Section 1 of the Sherman Act, but to the specific concept of price discrimination covered by Section 2 of the Clayton Act. Of course, in the absence of specific legislation, there is wide room for interpretation of the phrase "unfair method of competition", as indicated by the two cases cited by the Supreme Court. *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U. S. 304; *Federal Trade Commission* v. *Gratz*, 253 U. S. 421. But, as the Supreme Court said in the *Gratz* case (in holding that the conduct there complained of did not constitute an unfair method of competition):

> "The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppres-

* In view of the charge and finding of combination and conspiracy on both counts of the complaint in the *Cement* case, any reference to "individual" conduct was necessarily *obiter dictum*.

> sion, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." (253 U. S. at p. 427)

Our point is that in the specific field of individual price discrimination (as distinguished from the general field of deceptive trade practices, combinations in restraint of trade and the like), the Congress has authoritatively declared the applicable public policy which may not be frustrated by the device of giving a new "interpretation" to a previously existing statute. And there is nothing in the opinion in the *Cement* case that suggests, even by implication, that the Supreme Court intended to alter in any respect its statement in the *Corn Products* case that the legality or illegality of discrimination in delivered prices must be determined on the basis of the provisions of Section 2 of the Clayton Act.

(4) Effect of Order on Freedom of Competition

Paragraph V of the Order prohibits the individual use by each petitioner not only of the basing-point method of quoting prices, but also of any other method of quoting or selling at prices which meet the delivered prices of other petitioners at any given location and which, as among purchasers from a single petitioner, "systematically differ in terms of mill nets according to the location of purchasers"* or "systematically reflect the inclusion of a transportation factor * * * less than the actual cost of transportation from point of shipment to destination" (R. 3547-48).

It is an established fact that conduit is a standardized commodity which cannot be sold in any market except at the lowest price at which it is offered for sale by any seller in that market. Consequently, if two or more sellers are to compete in that market, each must meet the lowest price of any of them—*i. e.*, all must quote the same price.†

But in the case of a manufacturer more distant from that

* The word "systematically", applied to a business operation can mean nothing more than "regularly" or "repeatedly". The term "mill net" is used by the Commission to describe that part of the delivered price which is left to the seller after deducting the cost of transportation. If the "mill nets" may not differ according to the location of purchasers, then the delivered price to all purchasers must be a uniform mill price plus actual cost of transportation to destination.

† A price reduction by one seller may, of course, produce a momentary variation in quotations; but since competitors must meet the lower price to stay in the market, price uniformity (at the lower level) must immediately follow.

market that its competitors, the cost of transportation (an important element of the price of conduit at any market) is necessarily higher than that of its competitors, and all or part of that higher cost must be "absorbed" in order to make sales at that market. Consequently, sales at the market price thus established—by whatever method of quoting or selling—will necessarily result in a lower mill net return than on sales made by the same manufacturer to nearer purchasers. Accordingly, if such manufacturer regularly competes in the distant market, its prices will "systematically reflect the inclusion of a transportation factor . . . less than the actual cost of transportation from point of shipment to destination", and will "systematically differ in terms of mill nets according to the location of the purchasers".

It follows, therefore, that Paragraph V of the Order in the present case prohibits each petitioner from competing with another conduit seller in any territory in which such other conduit seller has a freight advantage.

That result, however, is in direct conflict with, and renders nugatory, the right to meet competition which is expressly recognized by the Robinson-Patman Act, Section 2(b), which authorizes discrimination in price where the lower price to one purchaser is made in good faith to meet an equally low price of a competitor.

That result is also in direct conflict with the theory of free competition underlying all of the antitrust laws. The Commission's Order would divide the country into a series of regional monopolies because of the necessity for sellers to quote all prices f.o.b. mill. That is clear for two reasons: First, a producer within its own "natural freight advantage" territory would be protected from outside competition by the freight rate barrier, and, secondly, the same barrier would prevent such producer from selling outside its own territory. Such regional monopolies would not be the result of the natural operation of the laws of supply and demand, and would not be the result of any act or wish of the buyers and sellers concerned. They would be the result of the adoption of the theory of the Federal Trade Commission. If the sellers of conduit had entered into an agreement to accomplish the results which would be accomplished by the enforcement of the Commission's Order in this case, that agreement would unquestionably, and properly, have been branded by the Commission and by the Courts as a gross violation of the antitrust laws.

(5) Economic Consequences of Order

The economic consequences of the Commission's Order are staggering. Theoretically, of course, each petitioner might have a market for its products within the area in which it has a "natural freight advantage". As a practical matter, however, in most cases a manufacturer cannot long survive if the marketing of his products is limited to that area. By way of illustration, 7 of the 10 manufacturers of conduit are located in or near Pittsburgh, Pa. To the west of Pittsburgh are the plants of petitioner, The Youngstown Sheet and Tube Company at Struthers, Ohio, and Indiana Harbor, Ind., and, to the south and west, the plant of Laclede Steel Company at St. Louis, Mo. To the east of Pittsburgh is the plant of petitioner, Walker Brothers at Conshohocken, Pa. Manifestly, the limited area in which the Pittsburgh manufacturers have a freight advantage over their competitors to the west and to the east could not provide an adequate market for the products of such manufacturers and, in order for them to compete for the business on the eastern seaboard and in the far west, a major relocation of manufacturing facilities in the conduit industry would be required. There is, however nothing in the record to suggest that the market for conduit is such as to justify such relocation of manufacturing facilities. On the contrary, not only is the total demand for conduit relatively small, but since the use of conduit is practically confined to building construction, the total demand for conduit varies with fluctuations in building activity. The variations in building activity in one area, and hence the demand for conduit in that area, do not generally correspond either seasonally or cyclically with similar variation in other areas. Consequently, the effect of the Order will inevitably be to put many of the petitioners out of business.

The adoption of the Commission's theory would result in widespread and destructive dislocation of existing capital investments in the conduit industry and in all other industries where the cost of delivery represents a significant portion of the total cost of the product to the purchaser. The heavy industries of the United States are, generally speaking, mass-production industries. They have grown up at points where available raw material, fuel, power and transportation to markets, all combine to give the lowest costs. Because they have been able to distribute their products on

BLEED THROUGH – POOR COPY

a nationwide basis, such industries have been able to employ mass-production methods which have become world famous, and which have made possible low prices and the rapid introduction throughout the country of products reflecting inventions and improvements in the science of manufacturing.

But the Order of the Commission would make freight rates on finished products* the sole determining factor in the location of new plants, and would have a disruptive and catastrophic effect on existing industry of such magnitude that it cannot be estimated with accuracy. It is, however, clear that enforcement of that portion of the Commission's Order which requires that sales to all purchasers be at a uniform mill price (plus, in the case of sales at delivered prices, actual cost of transportation) would benefit large companies with multiple plants at strategic locations—or with sufficient capital to build such plants, and would injure those producers that, for reasons other than freight rates, have located plants in small communities. Such a system would militate against manufacturers in small communities generally by causing them to fail because of insufficient outlet for their products, or to remove their plants to locations near large consuming centers which offer the most concentrated markets.

The Commission has made no attempt to explain to the Court (and, indeed, has apparently made no attempt to understand or appraise for itself) the economic results of what it is attempting to do in this case. Instead, ignoring the fact that its efforts may result in completely disrupting the nation's historic and efficient methods of distribution (for which no practicable substitute is offered), the Commission narrows its attack on delivered prices to an extent that makes it all but impossible for the Court to obtain an understanding of the immense proportions of the subject with which it is dealing.

---

* The fallacy of the Commission's emphasis on the factor of cost of transportation of the finished product, to the exclusion of all other factors entering into delivered prices, is strikingly demonstrated in the *Conduit* case. Thus the Commission cites (FF. 17, R. 3540) Walker Brothers' price for conduit at Philadelphia, "equivalent to the sum of the Pittsburgh base price plus the delivery charge factor from Pittsburgh to Philadelphia" as an illustration of "phantom freight". To be sure, Walker Brothers does not have to pay freight from Pittsburgh to Philadelphia on the finished product. But it does have to pay freight at substantially the same rate on its principal raw material, standard steel pipe—a cost not incurred by conduit manufacturers located in the vicinity of the steel pipe producers at Pittsburgh.

Conclusion.

The necessary consequences of the Order in its present form are so drastic that authority therefor cannot be assumed to have been intended by the legislation under which the Commission has purported to act. Certainly, we cannot believe that this Court would have given its sanction to the Commission's Order except upon the misapprehension that it was required to do so by the decisions of the Supreme Court. As we have pointed out, the legal question involved in Count II of the complaint and in the corresponding paragraph of the Order has never been before the Supreme Court in any case and was not even discussed in the majority opinion in the *Cement* case. This Court is, therefore, free to exercise its judicial function to decide the question, and we submit that it should do so.

Wherefore, on the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that, upon further consideration, the Order under review, in so far as it enjoins the independent use by each petitioner of the basing-point method of quoting and selling conduit or any other method of quoting or selling at prices which "systematically reflect the inclusion of a transportation factor * * * less than the actual cost of transportation from point of shipment to destination", or which "systematically differ in terms of mill nets according to the location of purchasers," be set aside and Count II of the complaint dismissed as to all petitioners.

May 25, 1948.

Respectfully submitted,

MORTON PEYSER,
8 West 40th Street,
New York, N. Y.,
Attorney for petitioners in No. 8639.

ROSE, EICHENAUER, STEWART & ROSE,
717 Oliver Building,
Pittsburgh, Pa.,
Attorneys for petitioners in No. 8640.
W. DENNING STEWART,
Of Counsel.

CRAVATH, SWAINE & MOORE,
15 Broad Street,
New York, N. Y.,
Attorneys for petitioners in No. 8642.
HOYT A. MOORE,
ALBERT R. CONNELLY,
Of Counsel.

CAHILL, GORDON, ZACHRY & REINDEL,
63 Wall Street,
New York, N. Y.,
Attorneys for petitioners in No. 8644.
THURLOW M. GORDON,
Of Counsel.

SULLIVAN & CROMWELL,
48 Wall Street,
New York, N. Y.,
Attorneys for petitioners in No. 8649.

And afterwards, to-wit, on the fourteenth day of June, 1948, the following further proceedings were had and entered of record, to-wit:

Clayton Mark & Co., *et al.*, *Petitioners,* vs. Federal Trade Commission, *Respondents.*	Petition for Review of an Order of the Federal Trade Commission.
No. 8642	

It is ordered by the Court that the petition for rehearing of this cause be, and the same is hereby, denied.

And afterwards, to-wit, on the seventeenth day of June, 1948, a Motion was filed in the office of the Clerk of this Court, which Motion for stay of certification, etc., is in the words and figures to follow, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8642.

Triangle Conduit & Cable Co., Inc., and The M. B. Austin Company (No. 8639), Enameled Metals Company, Steelduct Company and Lawrence R. Quinn (No. 8640), Clayton Mark & Company, Fretz-Moon Tube Company, Inc., Laclede Steel Company, National Electric Products Corporation, Republic Steel Corporation, Walker Brothers, the Youngstown Sheet and Tube Company, James M. Barton, I. A. Bennett, and Hervey S. Walker (No. 8642), General Electric Company and General Electric Supply Corporation (No. 8644), Spang Chalfant, Inc. and H. G. Morrow (No. 8649),

Petitioners,

vs.

Federal Trade Commission,

Respondent.

NOTICE OF MOTION FOR STAY OF CERTIFICATION AND ENFORCEMENT OF JUDGMENT.

(Filed June 17, 1948. Kenneth J. Carrick, Clerk.)

Sirs:

Please Take Notice that on or before June 17, 1948, we will file with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit the within motion of the petitioners, dated June 15, 1948, for an order staying the certification and enforcement of the judgment of this

Court in the above-entitled proceedings in order to enable said petitioners to apply for a writ of certiorari from the Supreme Court of the United States.

June 15, 1948.

Cravath, Swaine & Moore,
Attorneys for petitioners in No. 8642.

Cahill, Gordon, Zachry & Reindel,
Attorneys for petitioners in No. 8644.

Sullivan & Cromwell,
Attorneys for petitioners in No. 8649.

Morton Peyser,
Attorney for petitioners in No. 8639.

Rose, Eichenauer, Stewart & Rose,
Attorneys for petitioners in No. 8640.

To:
Federal Trade Commission,
Washington, D. C.

PROOF OF SERVICE.

State of New York, } ss.
County of New York. }

Frederic A. Bachur, being duly sworn, deposes and say that he is a clerk in the employ of Cravath, Swaine & Moor attorneys for the above-named petitioners in No. 8642 that on June 15, 1948, at or about 6:00 P. M. of that da he served the foregoing notice and annexed motion upo W. T. Kelley, Esq., General Counsel for the Federal Trad Commission, by depositing a true and correct copy thereo at the Church Street Annex of the post office departmen regularly maintained by the United States Government a 90 Church Street, New York, N. Y., enclosed in a postpai sealed wrapper addressed to said W. T. Kelley at the office of the Federal Trade Commission, Washington, D. C.

Frederic A. Bachur.

Sworn to before me this 15th day of June, 1948.

(Seal) Dana M. Raymond,
Notary Public, State of New York.
Residing in New York County.
N. Y. Co. Clk's No. 411, Reg. No. 885-R-9
Commission expires March 30, 1949.

BLEED THROUGH – POOR COPY

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8642.

Triangle Conduit & Cable Co., Inc., and The M. B. Austin Company (No. 8639), Enameled Metals Company, Steelduct Company and Lawrence R. Quinn (No. 8640), Clayton Mark & Company, Fretz-Moon Tube Company, Inc., Laclede Steel Company, National Electric Products Corporation, Republic Steel Corporation, Walker Brothers, the Youngstown Sheet and Tube Company, James M. Barton, I. A. Bennett, and Hervey S. Walker (No. 8642), General Electric Company and General Electric Supply Corporation (No. 8644), Spang Chalfant, Inc. and H. G. Morrow (No. 8649),

Petitioners,

vs.

Federal Trade Commission,

Respondent.

MOTION FOR STAY OF CERTIFICATION AND ENFORCEMENT OF JUDGMENT.

(Filed June 17, 1948. Kenneth J. Carrick, Clerk.)

To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Now Come the Petitioners above named, and, pursuant to the provisions of Section 350 of Title 28 of the United States Code and Rules 25 and 34 (9), (10), (11) of this Court, respectfully move this Court for an order

(1) staying for 90 days from the date of entry of such order the certification and enforcement of the judgment of this Court in the above-entitled proceedings, in order to enable said petitioners to make application to the Supreme

Court of the United States for a writ of certiorari to review the decision of this Court; and

(2) further staying the certification and enforcement of the judgment of this Court pending disposition by the Supreme Court of said application for writ of certiorari.

June 15, 1948.

Respectfully submitted,

Cravath, Swaine & Moore,
Attorneys for petitioners in No. 8642.

Cahill, Gordon, Zachry & Reindel,
Attorneys for petitioners in No. 8644.

Sullivan & Cromwell,
Attorneys for petitioners in No. 8649.

Morton Peyser,
Attorney for petitioners in No. 8639.

Rose, Eichenauer, Stewart & Rose,
Attorneys for petitioners in No. 8640.

And on the same day, to-wit, the seventeenth day of June, 1948, the following further proceedings were had and entered of record, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

1212 Lake Shore Drive

Chicago 10, Illinois.

June 17, 1948.

Before:

Hon. Otto Kerner, Circuit Judge.

8639	Triangle Conduit & Cable Co., Inc., *et al.*,	Petitions for Review of an Order of the Federal Trade Commission.
8640	Enameled Metals Company, *et al.*,	
8642	Clayton Mark & Company, *et al.*,	
8644	General Electric Company, *et al.*,	
8649	Spang Chalfant, Inc., *et al.*, *Petitioners*, *vs.* Federal Trade Commission, *Respondent.*	

On motion of counsel for the Petitioners, it is ordered that the certification and enforcement of the judgment of this Court in the above entitled proceedings be, and the same are hereby stayed for a period of ninety (90) days from the date of said judgment, pending application by the Petitioners to the Supreme Court of the United States for a writ of certiorari, and further staying the certification and enforcement of the judgment of this Court pending disposition by the Supreme Court of said application for a writ of certiorari.

And afterward, to-wit, on the seventeenth day of August, 1948, the following Final Decree of Enforcement was rendered and entered of record, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Nos. 8639, 8640, 8642, 8644, 8649.

Triangle Conduit & Cable Co., Inc., and The M. B. Austin Company, Enameled Metals Company, Steelduct Company and Lawrence R. Quinn, Clayton Mark & Company, Fretz-Moon Tube Company, Inc., Laclede Steel Company, National Electric Products Corporation, Republic Steel Corporation, Walker Brothers, The Youngstown Sheet and Tube Company, James M. Barton, I. A. Bennett and Hervey S. Walker, General Electric Company and General Electric Supply Corporation, Spang Chalfant, Inc., and H. G. Morrow,

Petitioners,

vs.

Federal Trade Commission,

Respondent.

FINAL DECREE COMMANDING OBEDIENCE TO FEDERAL TRADE COMMISSION'S ORDER TO CEASE AND DESIST.

(Filed August 17, 1948. Kenneth J. Carrick, Clerk.)

The petitioners in the above designated cases having filed in this Court their petitions to review and set aside an order to cease and desist entered against them by the Federal Trade Commission on June 6, 1944, and the Court having on May 12, 1948, upheld said order to cease and desist against all petitioners and having announced that said order will be enforced as to all petitioners;

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed that the order to cease and desist herein entered

against petitioners by the Federal Trade Commission on June 6, 1944, be, and it is hereby affirmed as to all petitioners, and that each and all of the other petitioners in the above designated cases are hereby commanded to comply with and to obey the said order to cease and desist, the terms and text of which are set forth below, as follows:

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answers of respondents, testimony and other evidence in support of and in opposition to the allegations of said complaint taken before an examiner of the Commission theretofore duly designated by it, report of the trial examiner and exceptions thereto, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act;

It Is Ordered that respondent Rigid Steel Conduit Association, an unincorporated voluntary association, its officers, directors, representatives, agents, and employees, the corporate respondents Clayton Mark & Company, Cohoes Rolling Mill Company, Enameled Metals Company, Fretz-Moon Tube Company, Inc., General Electric Company, Laclede Steel Company, National Electric Products Corporation, Steelduct Company, Triangle Conduit & Cable Company, Inc., Walker Brothers, Youngstown Sheet and Tube Company, Republic Steel Corporation, M. B. Austin Company, their respective officers, representatives, agents, and employees, in or in connection with the offering for sale, sale, and distribution of rigid steel conduit in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Quoting or selling rigid steel conduit at prices calculated or determined pursuant to or in accordance with the basing-point, delivered-price system; or quoting or selling rigid steel conduit at

prices calculated or determined pursuant to or in accordance with any other plan, system, or formula which produces identical price quotations or prices for rigid steel conduit by respondents using such plan, system, or formula at points of quotation or sale, or to particular purchasers, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents as against any of the other respondents.

2. Establishing, fixing, or maintaining prices, terms or conditions of sale for rigid steel conduit, or adhering to any prices, terms, or conditions of sale so fixed or maintained.

3. Collecting, compiling, circulating, or exchanging information concerning common carrier transportation charges used or to be used as a factor in computing the price of rigid steel conduit; or using, directly or indirectly, any such information so collected, compiled, or received as a factor in computing the price of rigid steel conduit.

4. Collecting, compiling, circulating, or exchanging "freight adders," delivery charge booklets, or other information concerning delivery charges on rigid steel conduit used or to be used as a factor in computing the price of such conduit; or using, directly or indirectly, any such information so collected, compiled, or received as a factor in computing the price of rigid steel conduit.

5. Circulating or exchanging information concerning the classification granted or to be granted to any specific purchaser of rigid steel conduit; or determining upon any basis for the selection or classification of customers, or using any basis so determined for selecting or classifying customers.

6. Determining upon the location, establishment, maintenance, or discontinuance of warehouses or other places for the stocking of supplies of rigid steel conduit.

7. Formulating or adopting consigned stock, specific building, or any other forms of contracts or agreements concerning the sale or distribution of rigid steel conduit, or using any contracts or agreements so formulated or adopted, for the pur-

pose or with the effect of aiding or assisting in arriving at or maintaining uniform prices, terms, or conditions in the sale or distribution of such conduit.

8. Directly or indirectly, investigating or checking the prices, quantities, terms, or conditions of any sale or offer to sell rigid steel conduit to any buyer or prospective buyer for the purpose or with the effect of aiding or assisting in maintaining uniform prices, terms, or conditions in the sale of such conduit.

9. Doing or causing any of the things forbidden in the preceding paragraphs of this order to be done through respondents Charles Donley, Herbert S. Blake, Organization Service Corporation, or any other individual, corporation or organization.

It Is Further Ordered that respondent Charles Donley, an individual, his representatives, agents, and employees, do forthwith cease and desist from knowingly, advising, assisting, or cooperating with the aforesaid respondents, or any of them, in doing any of the things forbidden by paragraph numbered 3 above.

It Is Further Ordered that respondent Herbert S. Blake, an individual, his representatives, agents, and employees, and respondent Organization Service Corporation, a corporation, its officers, representatives, agents, and employees, do forthwith cease and desist from advising, aiding, assisting or directing the aforesaid respondents in any manner in doing any of the things forbidden by paragraphs numbered 1 to 8, inclusive, of this order.

It Is Further Ordered that respondent The National Electrical Wholesalers Association, an unincorporated association, its officers and members, the officers and members of its conduit committee, and respondents General Electric Supply Corporation, a corporation, E. B. Latham & Company, a corporation, Graybar Electric Company, Inc., a corporation, Revere Electric Supply Company, a corporation, Kiefer Electrical Supply Company, a corporation, Westinghouse Electric Supply Company, a corporation, Fife Electric Supply Company, Columbian Electrical Company, W. T. McCul-

lough Electric Company, Peerless Electric Supply Company, The Hardware and Supply Company, F. D. Lawrence Electric Company, and The C. S. Mersick and Company, individually and as such members, their respective officers, representatives, agents, and employees, do forthwith cease and desist from aiding, assisting, or cooperating in any manner with the respondents subject to the provisions of paragraphs numbered 1 to 8, inclusive, of this order, or any of them, in doing any of the things forbidden in said paragraphs.

It Is Further Ordered that each of the corporate respondents Clayton Mark & Company, Cohoes Rolling Mill Company, Enameled Metals Company, Fretz-Moon Tube Company, Inc., General Electric Company, Laclede Steel Company, National Electric Products Corporation, Steelduct Company, Triangle Conduit & Cable Company, Inc., Walker Brothers, Youngstown Sheet and Tube Company, Spang Chalfant, Inc., Republic Steel Company, and M. B. Austin Company, their respective officers, representatives, agents, and employees, and respondents George L. Hatheway, Regina G. Hatheway, Katherine R. Hatheway, and Jane Hatheway, co-partners trading as Clifton Conduit Company, their representatives, agents, and employees, in or in connection with the offering for sale, sale, and distribution of rigid steel conduit in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from doing any of the following things for the purpose or with the effect of systematically matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discrimination in the mill nets received on sales to different purchasers:

(a) Quoting or selling rigid steel conduit at prices calculated or determined pursuant to, or in accordance with, the basing-point delivered-price system.

(b) Quoting or selling rigid steel conduit at delivered prices calculated as, or systematically equivalent to, the sum of the prices in effect at, plus a transportation charge factor from, any point other than the actual shipping point.

BLEED THROUGH = POOR COPY

(c) Quoting or selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination.

(d) Discriminating among purchasers by quoting or selling rigid steel conduit at prices which systematically differ in terms of mill nets according to the location of purchasers, and which mill nets, plus common carrier transportation charges to the respective locations of such purchasers, produce delivered costs identical with those to such purchasers from differently located respondents.

It Is Further Ordered that, for reasons appearing in the findings as to the facts, the complaint herein be, and the same hereby is, dismissed as to Central Tube Company, Garland Manufacturing Company, Laclede Tube Company (Missouri), Steel and Tubes, Inc., and F. C. Hodkinson; that Count I of the complaint be, and the same hereby is, dismissed as to respondents George L. Hatheway, Regina G. Hatheway, Katherine R. Hatheway, and Jane Hatheway, co-partners trading as Clifton Conduit Company, and respondent Spang Chalfant, Inc.; and that Count II of the complaint be, and the same hereby is, dismissed as to respondent General Electric Supply Corporation.

It Is Further Ordered that the respondent shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

And It Is Hereby Further Ordered, Adjudged And Decreed that each and all of the petitioners herein shall have a period of sixty (60) days from and after the date of this decree within which to file with the Federal Trade Commission their report in writing setting forth in detail as provided by said order the manner and form in which they have complied with said order to cease and desist.

And It Is Hereby Further Ordered, Adjudged And Decreed that this Court retain and it does hereby retain, jurisdiction of this proceeding to the extent necessary to compel obedience to said order to cease and desist but with-

out prejudice to the right of the Federal Trade Commission to initiate such contempt proceedings or other proceedings for that purpose as may be warranted by law.

By the Court.

William M. Sparks,
Otto Kerner,
Sherman Minton,
United States Circuit Judges.

Endorsed: In the United States Circuit Court of Appeals For the 7th Circuit Triangle Conduit & Cable Co., Inc., et al., Petitioners, *vs.* Federal Trade Commission, Respondents. Nos. 8639, 8640, 8642, 8644, 8649. Final Decree. Walter B. Wooden, Asso. Gen. Counsel for Federal Trade Commission.

And afterward, to-wit, on the eighth day of October, 1948, a designation for Supreme Court record was filed in the office of the Clerk of this Court, which designation is in the words and figures to follow, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8642.

Clayton Mark & Company, *et al.*,
Petitioners,
vs.
Federal Trade Commission,
Respondent.

DESIGNATION FOR SUPREME COURT RECORD.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Come Now The Petitioners in the above-entitled case, and hereby designate for printing and for inclusion in the record before the Supreme Court of the United States the following documents:

(1) Minutes of hearing before the United States Circuit Court of Appeals for the Seventh Circuit on January 19, 1948;

(2) Order taking cause under advisement dated January 19, 1948;

(3) Opinion of the Circuit Court of Appeals dated May 12, 1948;

(4) Order on opinion dated May 12, 1948;

(5) Petition for rehearing filed May 27, 1948;

(6) Order denying petition for rehearing dated June 14, 1948:

(7) Order granting stay of certification and enforcement of judgment dated June 17, 1948;

(8) Decree of enforcement entered August 17, 1948; and

(9) Designation for Supreme Court record dated October 8, 1948.

October 8, 1948.

Cravath, Swaine & Moore,
Attorneys for Petitioners.

Endorsed: Index No. 8642. In the United States Circuit Court of Appeals for the Seventh Circuit. Clayton Mark & Company, et al., Petitioners, *vs.* Federal Trade Commission, Respondent. Designation for Supreme Court Record. Cravath, Swaine & Moore, Attorneys for Petitioners, 15 Broad Street, New York 5, N. Y.

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of papers filed and proceedings had in accordance with the designation of record filed October 8, 1948, in:

Cause No. 8642.

Clayton Mark & Co., *et al.*,

Petitioners,

vs.

Federal Trade Commission,

Respondent,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 20th day of October, A. D. 1948.

Kenneth J. Carrick,

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

[fol. 3719] [Stamp:] Office of the Clerk, Supreme Court, U. S., Oct. 29, 1948

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. —

TRIANGLE CONDUIT & CABLE CO., INC., et al., Petitioners,

v.

FEDERAL TRADE COMMISSION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 15th, 1948.

Wiley Rutledge, Associate Justice of the Supreme Court of the United States.

Dated this 29th day of October, 1948.

[fol. 3720] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO 10, ILLINOIS

November 4, 1948.

Before Hon. Otto Kerner, Circuit Judge

8639, 8640, 8642, 8644, 8649

TRIANGLE CONDUIT & CABLE CO., INC., et al., ENAMELED METALS COMPANY, et al., Clayton Mark & Company, et al., General Electric Company, et al., Spang Chalfant, Inc., et al., Petitioners,

vs.

FEDERAL TRADE COMMISSION, Respondent

PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

On motion of counsel for the Petitioners, it is ordered that the certification and enforcement of the judgment of this Court in the above entitled proceedings be stayed until and including December 15, 1948, in order to enable the Petitioners to file a petition for a writ of certiorari in the Supreme Court of the United States; and that the certification and enforcement of the judgment of this Court be further stayed pending disposition by the Supreme Court of the said petition for writ of certiorari.

A True Copy. Teste:

Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, by R. Hays Blanchard, Chief Deputy Clerk. (Seal.)

[fol. 3721] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1948

No. —

CLAYTON MARK AND COMPANY, et al., Petitioners,

against

FEDERAL TRADE COMMISSION, Respondent

STIPULATION

Whereas, pursuant to Order of the United States Court of Appeals for the Seventh Circuit, the exhibits filed in said Court as part of the certified transcript of the record of the proceedings herein before the Federal Trade Commission constituted for all purposes a part of the record on review in said Court but were not printed as part of the printed transcript of such record,

It Is Hereby Stipulated that the aforesaid exhibits shall be available to this Court upon its consideration of any petition for a writ of certiorari duly filed by petitioners and, in the event that such petition shall be granted, upon its consideration of this cause; and that any party hereto may, at its own expense, furnish, for inspection by this Court upon the submission of any brief or upon any oral argument herein, photostatic or printed copies of any such exhibits.

December 9, 1948.

Allen R. Connelly, Counsel for Petitioners; Philip B. Perlman, Solicitor General of the United States, Counsel for Respondent.

[fol. 3722] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 31, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.